| No. 17-432 | |
|---|---|
| Title: | **China Agritech, Inc., Petitioner**<br>**v.**<br>**Michael H. Resh, et al.** |
| Docketed: | September 22, 2017 |
| Lower Ct: | United States Court of Appeals for the Ninth Circuit |
| Case Numbers: | (15-55432) |
| Decision Date: | May 24, 2017 |
| Rehearing Denied: | July 3, 2017 |
| **Questions Presented** | |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| Sep 21 2017 | Petition for a writ of certiorari filed. (Response due October 23, 2017) |
| Oct 12 2017 | Waiver of right of respondent Charles Law to respond filed. |
| Oct 23 2017 | Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al. |
| Oct 23 2017 | Brief of respondents William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V. in opposition filed. |
| Nov 07 2017 | Reply of petitioner China Agritech, Inc. filed. |
| Nov 08 2017 | DISTRIBUTED for Conference of 12/1/2017. |
| Dec 04 2017 | DISTRIBUTED for Conference of 12/8/2017. |
| Dec 08 2017 | Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al. GRANTED. |
| Dec 08 2017 | Petition GRANTED. |
| Jan 17 2018 | Blanket Consent filed by Petitioner, China Agritech, Inc..<br><br>**Blanket Consent** |

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| Jan 22 2018 | Brief of petitioner China Agritech, Inc. filed.<br>**Main Document** **Proof of Service** **Certificate of Word Count** |
| Jan 22 2018 | Joint appendix filed. (Statement of costs filed)<br>**Main Document** **Proof of Service** |
| Jan 24 2018 | SET FOR ARGUMENT ON Monday, March 26, 2018 |
| Jan 24 2018 | Blanket Consent filed by Respondents, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V..<br>**Blanket Consent** |
| Jan 26 2018 | Brief amicus curiae of DRI--The Voice of the Defense Bar filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Jan 29 2018 | Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Jan 29 2018 | Brief amici curiae of Securities Industry and Financial Markets Association filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Jan 29 2018 | Brief amicus curiae of Washington Legal Foundation filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Feb 07 2018 | CIRCULATED |
| Feb 21 2018 | Record requested from the U.S.C.A. 9th Circuit. |
| Feb 21 2018 | Brief of respondents William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V. filed. (Distributed)<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Feb 21 2018 | Supplemental joint appendix filed. (Statement of costs filed) (Distributed)<br>**Main Document** **Proof of Service** **Other** |
| Feb 27 2018 | Brief amici curiae of Plaintiffs in Post-Dukes Successor Class Actions filed. (Distributed)<br>**Main Document** **Proof of Service** **Certificate of Word Count** |
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| Mar 16 2018 | Reply of petitioner China Agritech, Inc. filed. (Distributed) | | |
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No. 17-__

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner*,

v.

MICHAEL RESH, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court held that the "timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (emphasis added). In this case, two defective class actions were filed during the limitations period. Respondents, absent members of the rejected classes, filed a third class action, this time outside the limitations period. The Ninth Circuit construed *American Pipe* to toll the limitations period and make this third class action timely. Respondents' class complaint would have been dismissed as untimely in at least six other Circuits, which have held—as this Court recognized in *Irwin* and other cases—that *American Pipe* applies only to individual actions, not new class actions brought by previously absent class members.

The question presented is:

Whether the *American Pipe* rule tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period.

## PARTIES TO THE PROCEEDING

Petitioner, a defendant below, is China Agritech, Inc.

The other defendants in the court below—and "respondents by rule" here—are Yu Chang, Yau-Sing Tang, Gene Michael Bennett, Xiao Rong Teng, Ming Fang Zhu, Lun Zhang Dai, Hai Lin Zhang, Charles Law, and Zheng Anne Wang. Of these individual defendants, only Charles Law has been served.

Respondents, plaintiffs below, are Michael Resh, William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V.

## RULE 29.6 DISCLOSURE

China Agritech, Inc. has no parent corporation. Carlyle Asia Growth Partners IV, L.P. and CAGP IV Co-Investment, L.P., investment funds affiliated with The Carlyle Group, collectively own more than 10% of the stock of China Agritech, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The decision of the court of appeals is reported at 857 F.3d 994 and reprinted in the Appendix to the Petition ("App.") at 1a–23a. The district court's opinion granting petitioner's motion to dismiss is unpublished but reported at 2014 WL 12599849 and is reprinted at App. 24a–37a. The district court's opinion denying respondents' motion for reconsideration is unpublished but reported at 2015 WL 12781246 and is reprinted at App. 38a–44a.

## JURISDICTION

The court of appeals issued its decision on May 24, 2017. App. 1a. The court denied rehearing on July 3, 2017. App. 45a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

28 U.S.C. § 1658(b) provides, in relevant part: "[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

## INTRODUCTION

This Court's precedents have long held that statutes of limitations are equitably tolled during the pendency of a putative class action to allow absent class members to later bring their own otherwise untimely claims. *See Am. Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). This tolling rule protects absent class members' reliance on the class mechanism and discourages duplicative lawsuits.

For decades, the courts of appeals have uniformly rejected plaintiffs' attempts to extend *American Pipe* tolling to permit absent class members to bring not only their own claims, but also to bring claims on behalf of a class. The First, Second, Third, Fifth, Eighth, and Eleventh Circuits have held that the principles underlying *American Pipe* tolling for *individual* actions—i.e., preventing absent class members from having to file protective individual claims for fear of having them dismissed as untimely—have no application to serial *class* actions, particularly when a court had already rejected an attempt to certify a materially identical class. Tolling in those circumstances, these courts have explained, would not further any purpose recognized in *American Pipe*. Instead it would allow plaintiffs to engage in repeated attempts to certify class actions and thus undermine both the principles of *American Pipe* and the purpose of statutes of limitations.

In recent years, however, three courts of appeals—including the Ninth Circuit in the decision below—have rejected that conclusion and interpreted *American Pipe* to toll the limitations period to al-

low formerly absent class members not only to pursue their own claims but the claims of a putative class. The Ninth Circuit joined the Sixth and Seventh Circuits in adopting a rule that would extend the statute of limitations for class actions indefinitely, casting aside Congress's effort to cut off stale claims through clear time bars and inviting facially abusive litigation without any appreciable benefit to anyone other than the plaintiffs' bar.

This Court should grant certiorari to resolve the conflict among the courts of appeals over this important and recurring question. This six-to-three conflict will lead to obvious forum shopping opportunities, since the viability of an untimely class action will depend on the jurisdiction in which it was filed. After all, many nationwide class actions can be brought in any circuit, so plaintiffs seeking to lead untimely follow-on class actions will choose a circuit that permits stale class actions.

The question presented is also outcome-determinative in this case. There is no dispute that this class action is time-barred without the benefit of *American Pipe* tolling. It is the third of three materially identical class actions; the first two were timely filed but certification was denied. Respondents were absent members of the first two proposed classes and filed this putative class action outside the limitations period. It was allowed to proceed only because the Ninth Circuit held that *American Pipe* tolls the limitations period to allow previously absent class members to file new class actions. The class complaint would have been rejected as untimely had it been filed in most other circuits.

In short, this petition presents an important, recurring, and outcome-determinative question that divides the courts of appeals. And the Ninth Circuit answered that question incorrectly. Certiorari should be granted and the decision below reversed.

## STATEMENT OF THE CASE

### A. Relevant Legal Background

1. This is the third identical class action brought on behalf of shareholders of petitioner China Agritech, Inc. ("China Ag") alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. App. 8a. Congress has mandated that securities fraud actions like this one be brought within "2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). It is undisputed that the publicly available facts that respondents say constitute the alleged Exchange Act violations here were known and discovered more than two years before this complaint was filed. App. 9a. Thus, a straightforward application of the § 1658(b) two-year time bar would require dismissal of this action as untimely. *Id.*

2. Statutes of limitations reflect Congress's "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll. v. Ricks*, 449 U.S. 250, 260 (1980). Such time bars are as a general matter strictly enforced. *See, e.g., Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

This Court has also recognized, however, that statutes of limitations may be subject to equitable

tolling in "extraordinary circumstances." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). Relevant here is the equitable tolling rule first recognized in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974).

"[T]he source of the tolling rule applied in *American Pipe* is the judicial power to promote equity." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017). A limitations period is tolled during the pendency of a putative class action, the *American Pipe* Court explained, to allow absent class members to bring their own individual claims. *See* 414 U.S. at 553. The specific question in *American Pipe* was whether absent class members of an uncertified class could intervene as plaintiffs in the subsequent individual suits of the named plaintiffs, even if the statute of limitations would otherwise bar the intervention. To protect absent class members' reliance on the class mechanism and discourage duplicative lawsuits, the Court held that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.*; *see also id.* (Absent tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.").

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court extended the *American Pipe* rule to individual standalone claims. The Court reiterated that if statutory time limits for individual

claims were not tolled, the "result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. The Court therefore concluded that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Id.* at 354. "At that point," the Court explained, "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.*

3. This Court's precedents accordingly recognize that "plaintiff's timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (emphasis added). The question presented here is whether the *American Pipe* rule should be expanded to also toll statutes of limitations to allow previously absent class members to bring *class* actions outside the applicable limitations period.

**B. Factual And Procedural Background**

1. *Prior Class Actions*

a. The first proposed class action alleging that China Ag violated the Exchange Act was filed by Theodore Dean in February 2011. Dean wanted to represent a class of China Ag shareholders in suing China Ag and several managers and directors for allegedly violating §§ 10(b) and 20(a) of the Exchange Act, and § 11 of the Securities Act of 1933. App. 4a–6a. In October 2011, Judge Klausner—the same district judge as in this case—dismissed the Securities

Act claim on the pleadings but allowed the Exchange Act claims to proceed. App. 6a.

Dean and several newly added named plaintiffs then moved to certify a class. Respondents were not among the new named plaintiffs and did not seek to serve as lead plaintiffs or otherwise appear in the case. In March 2011, the district court denied class certification on the ground that the proposed class failed to satisfy Rule 23(b)(3)'s predominance requirement. App. 6a. Specifically, the district court concluded that the *Dean* plaintiffs had failed to satisfy the preconditions for a fraud-on-the-market theory of reliance and thus individual questions of reliance predominated over common ones. *Id.* The *Dean* plaintiffs appealed the class certification decision under Rule 23(f), and the court of appeals affirmed. *Id.*

The *Dean* plaintiffs subsequently settled their individual claims in September 2012. *Id.*

b. Approximately three weeks later, Kevin Smyth filed what the court of appeals characterized as "an almost identical class-action complaint on behalf of the same would-be class against China Agritech." App. 7a. The *Smyth* action was filed one year and eight months after plaintiffs' claims accrued. *Id.* Again, respondents did not seek to participate as named plaintiffs or appear in this action.

Although originally filed in the District of Delaware, the action was transferred to Judge Klausner. App. 7a. In August 2013, the *Smyth* plaintiffs moved for class certification, and the district court again denied the motion, this time for failure to sat-

isfy the typicality and adequate representation requirements of Rule 23(a)(3) and (a)(4). App. 7a–8a.

In January 2014, the *Smyth* plaintiffs dismissed their claims without prejudice. App. 8a.

2. *This Class Action*

It is undisputed that class members were given notice and an opportunity to intervene under the special notice requirements of the Private Securities Litigation Reform Act (the "PSLRA"). *See* 15 U.S.C. § 78u-4(a)(3). For more than three years, however, respondents chose not to get involved. Instead they waited until class certification in the *Dean* and *Smyth* actions was denied and only then sought to certify exactly the same class before the same district court that had already twice found class treatment inappropriate. App. 8a.

Respondents finally filed this case in June 2014—17 months after the applicable two-year statute of limitations had lapsed under 28 U.S.C. § 1658(b)(1). App. 8a–9a. Respondents alleged violations of Exchange Act §§ 10(b) and 20(a) "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." App. 8a. The case was again assigned to Judge Klausner. No other plaintiffs filed suit (either an individual or class action), sought to be appointed as lead plaintiffs, or otherwise showed an interest in this case.

3. *District Court Decision*

The district court rejected the class claims as time-barred. Relying on Ninth Circuit precedent,

the district court held that *American Pipe* tolling permitted respondents to bring their individual claims, but not another class action. The district court thus dismissed the class complaint, but permitted respondents to pursue individual actions. App. 29a–36a; *see also* App. 41a–44a.

4. *Court of Appeals Decision*

a. Respondents declined to pursue their individual claims, even though they claimed damages of nearly half a million dollars. They instead appealed, and a panel of the Ninth Circuit reversed. Departing from its own precedent, the panel held that *American Pipe* tolling permits absent class members to bring not only their own claims after the statute of limitation lapses, but also claims on behalf of absent class members—even when the district court previously found the identical class deficient. App. 22a.

The court of appeals acknowledged that an earlier Ninth Circuit panel had followed the Second Circuit in holding that "'extend[ing] tolling to class actions "tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options."'" App. 14a (quoting *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987), in turn quoting *Korwek v. Hunt*, 827 F.2d 874, 879 (2d. Cir. 1987)). But the court also construed its later *en banc* opinion in *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000), as rejecting that position. The court of appeals instead held that, in the Ninth Circuit, *American Pipe* tolls the limitations period for otherwise untimely class actions and the only limits on sequential class

actions are preclusion and comity principles. App. 15a–17a.

The court of appeals concluded that this view was consistent with three of this Court's recent cases, App. 17a–21a—two of which did not mention tolling at all, *see Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), and one of which characterized *American Pipe* tolling as applicable only to individual claims. *see Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011). The court of appeals also acknowledged *Smith*'s holding that preclusion does not apply to absent members of an uncertified class, *id.* at 315; *see* App. 18a, so preclusion principles cannot prevent perpetual class actions.

The court of appeals recognized that its rule could invite abusive litigation in the form of never-ending class actions, but identified three supposed safeguards against such abuse. First, the panel said that self-restraint by the plaintiffs' bar would serve to limit class litigation abuse. App. 22a. Second, the court held that preclusion principles would provide some barrier to serial litigation, despite acknowledging that preclusion does not apply to new class actions brought by previously absent class members (such as respondents). *Id.* Third, the panel explained that district courts could reject improper attempts to stack class actions by invoking "comity" to prior decisions denying class certification. *Id.*

b. The court of appeals denied rehearing and rehearing *en banc*. App. 46a. This petition followed.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to consider whether *American Pipe* tolling extends beyond individual actions by absent class members and allows those absent members to bring new class actions beyond the applicable limitations period. The courts of appeals are divided over that important and recurring question, and this case is an ideal vehicle through which to resolve it. And the court of appeals decided the question incorrectly.

The petition should be granted, and the decision below reversed.

### A. The Courts of Appeals Are Irreconcilably Divided over Whether *American Pipe* Tolling Extends to Otherwise Untimely Class Actions.

#### 1. *The First, Second, Fifth, and Eleventh Circuits Reject* American Pipe *Tolling for Class Actions.*

Four Circuits have definitively rejected the Ninth Circuit's position in this case that *American Pipe* tolling extends to otherwise untimely class actions, instead concluding that *American Pipe* applies only to *individual* claims of absent class members.

a. The First Circuit rejected extending *American Pipe* tolling to class actions in *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998). The court held that the "policies—respect for Rule 23 and considerations of judicial economy—which animated the *Crown, Cork* and *American Pipe* tolling rules dictate that the tolling rules . . . not permit plaintiffs to

stretch out limitations periods by bringing successive class actions." *Id.* at 11. "Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely," the court explained, because "[p]ermitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class." *Id.* "This simply cannot be what the *American Pipe* rule was intended to allow," the First Circuit concluded, "and we decline to embrace such an extension of that rule." *Id.*

b. As the court below recognized, App. 14a, the Second Circuit has also held that *American Pipe* tolling "was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification," because "such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure." *Korwek*, 827 F.2d at 879.

The Second Circuit also explained that this Court's precedents "represent a careful balancing of the interests of plaintiffs, defendants, and the court system." *Id.* The case before the court fell "beyond [those] carefully crafted parameters into the range of abusive options" because the plaintiffs had "filed a complaint alleging class claims identical theoretically and temporally to those raised in a previously filed class action suit which was denied class certification." *Id.* The Second Circuit concluded that the

"Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Id.*

c. The Fifth Circuit likewise rejected the rule adopted below in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985). There the court rejected the argument that the *American Pipe* "tolling principle applies . . . not only for the first class certification petition filed but also for any subsequent petitions involving the same class." *Id.* at 1351. The court explained that there is "no authority for the[] contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Id.* "To the contrary," the court concluded, "it has repeatedly been noted that 'the tolling rule [in class actions] is a generous one, inviting abuse,' and to construe the rule as plaintiffs would have us presents just such dangers." *Id.* (quoting *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring)).

d. The Eleventh Circuit has similarly held that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (internal quotation marks omitted). The court concluded that "the pendency of a previously filed class action does *not* toll the limitations period for additional class actions by putative members of the original asserted class." *Id.* (internal quotation marks omitted). Thus, the Eleventh Circuit agreed with the Fifth that "plaintiffs may not 'piggyback

one class action onto another,' and thereby engage in endless rounds of litigation in the district court and in this Court over the adequacy of successive named plaintiffs to serve as class representatives." *Id.* (quoting *Salazar-Calderon*, 765 F.2d at 1351).

The Eleventh Circuit has twice reaffirmed *Griffin*. *See Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1328 (11th Cir. 2015); *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1323 (11th Cir. 2017) ("In the Eleventh Circuit . . . [*American Pipe*] tolling is limited to individual, not class, claims." (citing *Griffin*)).

2. *The Third and Eighth Circuits Allow Tolling for Successive Class Actions in Some Circumstances, but Not When Class Certification Was Previously Considered and Denied.*

The Third and Eighth Circuits have held that *American Pipe* tolling can apply to subsequent class actions in *some* circumstances, i.e., "where class certification has been denied solely on the basis of the lead plaintiffs' deficiencies as class representatives, and not because of the suitability of the claims for class treatment." *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004); *see also Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (following *Yang*). But "*American Pipe* tolling does not apply where certification was denied based on deficiencies in the purported class itself." *Yang*, 392 F.3d at 99; *see also In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig.*, 795 F.3d 380, 409 n.27 (3d Cir. 2015) (Under *American Pipe*, "the filing of a class action lawsuit in federal court tolls the statute of limitation for the claims of unnamed class

members until class certification is denied or when the member ceases to be part of the class, at which point the class member may intervene or file an individual suit.").

Crucial to these courts' reasoning was that "[a]llowing tolling to apply to subsequent class actions where the original class was denied because of the lead plaintiffs' deficiencies as class representatives will not lead to the piggybacking or stacking of class action suits 'indefinitely.'" *Yang*, 392 F.3d at 112. Indefinite stacking of class actions is not a worry under this rule, the Third Circuit explained, because "applying tolling under these circumstances will allow subsequent classes to pursue class claims *until a court has definitively determined that the claims are not suitable for class treatment.*" *Id.* (emphasis added). But where, as in this case, a court has already determined that class certification should be denied because of deficiencies with the putative class, *American Pipe* tolling no longer applies in the Third and Eighth Circuits.

3. *The Sixth, Seventh, and Ninth Circuits Extend* American Pipe *to Toll the Limitations Period for Otherwise Untimely Class Actions.*

The Sixth, Seventh, and Ninth Circuits construe *American Pipe* to apply to both individual and class actions and permit endless relitigation of class certification determinations.

a. The Seventh Circuit was the first court of appeals to hold that *American Pipe* tolling applies equally to individual and class actions. In *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d

560 (7th Cir. 2011), the Seventh Circuit concluded that *American Pipe* tolling applies to save late class actions and that any limitations on successive class actions have "nothing to do with tolling or *American Pipe*, and everything to do with the preclusive effect of the first decision, plus a proper application of Rule 23's criteria." *Id.* at 564. The Seventh Circuit, which decided *Sawyer* before this Court's holding in *Smith* that preclusion does not apply to class certification decisions, seems to have believed that preclusion principles would prevent previously absent plaintiffs from re-litigating a class certification denial.

b. The Sixth Circuit, following *Sawyer*, has concluded that "subsequent class actions timely filed under *American Pipe* are not barred." *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652 (6th Cir. 2015). The court acknowledged that "[c]ourts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation," but it rejected "the blanket rule advocated by Wal-Mart that *American Pipe* bars all follow-on class actions." *Id.*

The difference between *Phipps* and *Sawyer* is that *Phipps* was decided *after Smith*, so the Sixth Circuit had the benefit of this Court's holding that absent class members of uncertified classes are not subject to preclusion. *See Smith*, 564 U.S. at 313. The *Phipps* Court thus understood that preclusion rules cannot solve the problem of stacked class actions. The court in fact embraced this consequence, explaining that "the rule against non-party preclusion" necessarily "leads to relitigation of many is-

sues," but "existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of" addressing the problem of abusive stacking of class actions. 792 F.3d at 653.

c. The court of appeals below joined the Sixth and Seventh Circuits in holding that *American Pipe* tolling applies to class actions, meaning that admittedly untimely successive class actions may nevertheless go forward indefinitely—even when another court has found the exact same class unsuitable for class certification—subject only to (i) plaintiff-attorney self-restraint, (ii) admittedly inapplicable preclusion principles, and (iii) "comity." *See supra* at 10; App. 21a–22a.

The decision below demonstrates the expansive breadth of the legal rule announced in *Sawyer* and *Phipps*. While the Sixth and Seventh Circuits both generally extended *American Pipe* tolling to class actions, neither case actually applied that rule in a circumstance where certification of an identical class had already been denied. *See Sawyer*, 642 F.3d at 564–65 (class dismissed without considering whether certification was proper); *Phipps*, 792 F.3d at 648–49 (proposed new class differed in material respects from previous class in which certification was denied).

In this case, by contrast, the court of appeals *agreed* that respondents' securities-fraud claims are "based on the same facts and circumstances, *and on behalf of the same would-be class*, as in the *Dean* and *Smyth* Actions," App. 8a (emphasis added)—i.e., the two previous class actions in which the district court had denied class certification. The decision below

thus not only adopts the Sixth and Seventh Circuits' pronouncement that *American Pipe* applies to subsequent class actions, but also demonstrates the rule's extreme consequence: in these circuits, there is no limit to a plaintiff's ability to stack class actions, one after another, except for whatever weak protections the discretionary doctrine of "comity" may afford. The rule in these courts thus invites exactly the sort of endless, vexatious litigation Congress enacts statutes of limitations to prevent.

* * *

As a result of the decisional conflict just described, the viability of successive otherwise untimely class actions depends on the jurisdiction in which the plaintiff elects to file suit. Absent members of an uncertified class will be subject to strict enforcement of statutory time limits in the First, Second, Third, Fifth, Eighth, and Eleventh Circuits. But identically situated absent class members will be able to file successive class actions in the Sixth, Seventh, and Ninth Circuits without regard to statutes of limitations and subject only to whatever constraint principles of "comity" impose on district courts. That differential treatment of prospective plaintiffs and defendants, depending solely on where a suit is filed, should not be allowed to persist.

The petition for a writ of certiorari should be granted.

### B. The Question Presented Is a Recurring Issue of National Importance, and This Case Presents an Ideal Vehicle for Resolving It.

1. Whether *American Pipe* tolling extends to successive class actions is a recurring question of national importance. At least nine courts of appeals have considered the question, *see supra* Section A, and district courts both within and outside those circuits continue to confront it.[1]

The effect of the conflict among the courts of appeals—and the need for national uniformity as to the question presented—is especially pronounced given the class action context. Any class action under a

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[1] *See, e.g.*, *Askins v. United States*, 113 Fed. Cl. 283, 288 (2013); *Folks v. State Farm Mut. Auto. Ins. Co.*, 281 F.R.D. 608, 614 (D. Colo. 2012); *Hershey v. ExxonMobil Oil Corp.*, 278 F.R.D. 617, 621 (D. Kan. 2011); *Dickson v. Am. Airlines, Inc.*, 685 F. Supp. 2d 623, 629–30 (N.D. Tex. 2010); *Gomez v. St. Vincent Health, Inc.*, 622 F. Supp. 2d 710, 712–14 (S.D. Ind. 2008); *Hunter v. Am. Gen. Life & Accident Ins. Co.*, 384 F. Supp. 2d 888, 891 (D.S.C. 2005); *Humes v. First Student, Inc.*, 2016 WL 5939436, at *3–6 (E.D. Cal. Oct. 11, 2016); *Barkley v. Pizza Hut of Am., Inc.*, 2015 WL 5008468, at *2 (M.D. Fl. Aug. 21, 2015); *Reaves v. Cable One, Inc.*, 2015 WL 12747944, at *4 (N.D. Ala. Mar. 16, 2015); *Lopez v. Liberty Mut. Ins. Co.*, 2015 WL 3630570, at *9 (C.D. Cal. Mar. 6, 2015); *Cleary v. Am. Capital, Ltd.*, 2014 WL 793984 at *3 (D. Mass. Feb. 28, 2014); *Love v. Wal-Mart Stores, Inc.*, 2013 WL 5434565, at *2–3 (S.D. Fla. Sept. 23, 2013); *Forde v. Waterman S.S. Corp.*, 2013 WL 5309453, at *5 (S.D.N.Y. Sept. 18, 2013); *Hull v. Wyeth*, 2012 WL 4857589, at *3 n.7 (S.D. Miss. Oct. 11, 2012); *Sheppard v. Capital One Bank*, 2007 WL 6894541, at *3 (C.D. Cal. July 11, 2007); *Vinson v. Seven Seventeen HB Phila. Corp.*, 2001 WL 1774073, at *6–7 (E.D. Pa. Oct. 31, 2001); *Lawrence v. Phillip Morris Cos.*, 1999 WL 51845, at *3 (E.D.N.Y. Jan. 9, 1999).

statute authorizing nationwide service of process can be brought in any circuit, and many other class actions can be brought in the Ninth Circuit given its expansive geographic reach. Because circuits applying *American Pipe* tolling to class actions "will attract actions in which courts in other circuits have denied class certification," *Yang*, 392 F.3d at 113–14 (Alito, J., concurring in part), the Sixth, Seventh, and Ninth Circuits will become magnets for the most abusive class actions—successive attempts to certify a class when previous certification attempts have failed. This Court's review is necessary to eradicate those forum shopping opportunities and establish uniformity as to this question of national importance.

2. This petition, moreover, provides an ideal vehicle through which to resolve the decisional conflict over the question presented. There is no dispute that, absent tolling of the statute of limitations during the pendency of the *Dean* and *Smyth* putative class actions—in which certification of the exact same class was denied—respondents' class action would be untimely under § 1658(b). App. 8a–9a. Nor is there any dispute that this action was "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." App. 8a.

This case thus squarely presents the purely legal question whether *American Pipe* tolling should be extended to absent class members' efforts to bring their own class actions. That question is outcome determinative here: If the Court grants certiorari and sides with the majority of courts of appeals that

have considered the question, the class claims will be rejected as time-barred. And there is no factual or jurisdictional impediment to this Court's deciding the question. The Court is unlikely to be presented with a better vehicle to resolve the circuit conflict.

### C. The Decision Below Is Incorrect.

The Ninth Circuit erred in extending *American Pipe* to class actions. This Court's decisions have repeatedly "described *American Pipe* as creating a tolling rule, necessary to permit the ensuing *individual actions* to proceed." *ANZ Sec.*, 137 S. Ct. at 2054–55 (emphasis added); *see also Smith*, 564 U.S. at 313 n.10 (describing *American Pipe* as holding that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*" (emphasis added)); *Irwin*, 498 U.S. at 96 n.3 (describing *American Pipe* as holding that "plaintiff's timely filing of a defective class action tolled the limitations period *as to the individual claims* of purported class members" (emphasis added)). These precedents begin with *Crown, Cork*, which announced a clear rule for when *American Pipe* tolling ends: "Once the statute of limitations has been tolled [under *American Pipe*], it remains tolled for all members of the putative class *until class certification is denied*." *Crown, Cork*, 462 U.S. at 354 (emphasis added). At that point, the Court explained, "class members may choose to *file their own suits* or to *intervene as plaintiffs* in the pending action." *Id.* (emphasis added).

The decision below turns that principle on its head. Under the Ninth Circuit's ruling, class mem-

bers are not limited to bringing their own suits or to intervening in the pending action, meaning the tolling period ends only when previously absent plaintiffs stop trying to certify new class actions. That rule cannot be reconciled with the principles animating *American Pipe* tolling and would lead to significant adverse policy consequences. Nothing in this Court's decisions justifies that result.

1. a. "Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli*, 568 U.S. at 448 (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). These statutory limits "inevitably reflec[t] [Congress's] value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Ricks*, 449 U.S. at 260. Thus, enforcement of statutory time bars is "vital to the welfare of society," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and integral to the "evenhanded administration of the law," *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam).

Congress, however, is also presumed to "legislate[] against a background of common-law adjudicatory principles." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (internal quotation marks omitted). This background includes "[e]quitable tolling, a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Id.*

(quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). But equitable tolling applies only when "some *extraordinary circumstance* stood in [the plaintiff's] way and prevented timely filing." *Menominee Indian Tribe*, 136 S. Ct. at 755 (internal quotation marks omitted and emphasis added). Equitable tolling rules "are very limited in character, and are to be admitted with great caution; otherwise, the court would make the law instead of administering it." *Gabelli*, 568 U.S. at 454 (internal quotation marks omitted).

b. In *American Pipe* and *Crown, Cork*, this Court recognized a specific "equitable tolling" rule applicable to class actions. *See Irwin*, 498 U.S. at 96 & n.3; *ANZ Sec.*, 137 S. Ct. at 2051 (holding *American Pipe* rule is "equitable"); *Young v. United States*, 535 U.S. 43, 49 (2002) (same). Those cases held that when a class action is timely filed, the statute of limitations must be tolled as a matter of equity to allow absent class members to subsequently bring their own *individual* claims (either through new complaints or intervention in the pending action) that would otherwise be untimely. *See American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 354. The concern was that if the time to intervene were not tolled during the pendency of a class action, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553. *Crown, Cork* extended this reasoning to absent class members' own individual actions, explaining that without the benefit of tolling, "class members would not be able to rely on the existence of the suit

to protect their rights," which would result in "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." 462 U.S. at 350–51.

This policy of avoiding unnecessary prophylactic *individual* actions during the pendency of class actions does not justify permitting successive *class* actions. *American Pipe* tolling applies to individuals who relied on a class action but subsequently determined that they wish to come forward to assert their (own) rights. Tolling the limitations clock in that situation relieves absent class members of the need to file potentially unnecessary individual actions and avoids needlessly burdening the courts, all of which is consistent with the more general rule that tolling applies only when the plaintiff can establish some "extraordinary circumstance" that "prevented timely filing." *Menominee Indian Tribe*, 136 S. Ct. at 755 (internal quotation marks omitted).

By contrast, plaintiffs who want to assert rights on behalf of others can act during the pendency of the existing putative class action and do not require the special protection of equitable tolling. They can, for example, seek a leadership role in the pending class action. Indeed, this case is governed by the PSLRA, which includes a detailed mechanism for early notice to potential class members to give anyone who wants to lead the class action the opportunity to do so. *See* 15 U.S.C. § 78u-4(a)(3). There is no dispute that the PSLRA governed the two prior classes in this case, yet respondents did nothing. *See supra* at 8. Alternatively, an absent class member

can file her own representative action and then seek consolidation with any other already-filed actions, including through the federal multi-district litigation procedure. There is simply no "need" to protect absent class members' *own* rights and interests by ensuring that if certification is denied, they can still pursue an action on *others'* behalf.

c. Recognizing tolling for subsequent class actions would also result in adverse policy consequences that do not arise when tolling is limited to individual actions.

Most obviously, as then-Judge Alito recognized, the tolling rule the Ninth Circuit adopted below "could extend the statute of limitations almost indefinitely." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part). The court of appeals' perpetual tolling rule, in other words, "would allow a purported class almost limitless bites at the apple as it continuously substitutes named plaintiffs and relitigates the class certification issue." *Ewing*, 795 F.3d at 1326. And after *Smith*, preclusion rules would provide no impediment to former absent class members'—and their attorneys'—attempts to stack class actions perpetually. *American Pipe* should not be construed to encourage such abusive litigation.

The Ninth Circuit rule, moreover, fundamentally undermines "basic policies of all limitations provisions," i.e., "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). According to the Ninth Circuit itself, the only impediments to perpetual class actions are (i) attorney self-restraint, which

can be elusive to say the least; (ii) preclusion, which does not apply to claims brought by absent class members; and (iii) comity, which is as vague as it is rare. App. 22a. But the whole point of statutes of limitations is to preclude stale claims *without* resort to such nebulous notions and discretionary doctrines. It is one thing to equitably toll limitations period for a short and finite period to allow individuals to bring their own claims. But a rule allowing a string of previously absent class members to try their hand at certifying a class simply cannot be reconciled with the existence of a statute of limitations.

Finally, the court of appeals' rule makes it much more difficult to timely settle disputes. Class certification is often the inflection point at which disputes are settled. Plaintiffs (and their attorneys) are normally unwilling to settle claims before class certification because if a class is certified, the value of the claim increases dramatically. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). If, however, class certification is denied, the parties are often willing to settle individual claims quickly because a contingency-fee plaintiff's attorney has little economic incentive to pursue the claims. Perpetual stacking of class actions distorts this result, because a decision denying class certification does not spell the end of the class action. It merely encourages an attorney to find new plaintiffs and "a district court judge who is willing to certify the class." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part).

Extending *American Pipe* to toll the limitations period for new class actions is thus inconsistent with the equitable principles animating *American Pipe* and *Crown, Cork*—not to mention the purpose of statutes of limitations—and its adoption would lead to significant adverse consequence. The Ninth Circuit's conclusion that *American Pipe*'s equitable tolling rule extends to new class actions should be rejected.

2. a. The court of appeals' contrary conclusion is based on a misunderstanding of the *American Pipe* tolling rule. The court appears to have assumed that *American Pipe* broadly allows for tolling of the limitations period for absent class members' claims, which then can be aggregated under Rule 23. App. 17a. The court, in other words, appears to believe that if an individual is authorized to bring an individual claim, she is also *automatically* authorized to aggregate the claim under Rule 23 so long as that rule's preconditions are satisfied. App. 17a, 21a–22a.

That analysis fundamentally misreads *American Pipe*. As explained earlier, the point of *American Pipe* is to allow absent class members *who want to bring individual actions* to do so without having to resort to wasteful protective litigation. *American Pipe* tolling, in other words, does not apply to absent class members who remain absent, because absent class members who choose to remain absent do not require tolling. *Cf. Menominee Indian Tribe*, 136 S. Ct. at 755 (equitable tolling can apply only when the plaintiff "has been pursuing his rights diligently"). Yet the effect of applying *American Pipe* to follow-on

class actions is to toll the limitations period not only for the new named plaintiffs, but also for individuals who continue to remain absent—i.e., individuals who have shown no interest in pressing their own individuals claims—and thus have no plausible entitlement to tolling. Nothing in *American Pipe*, or in equitable tolling principles more generally, supports that result.

Even setting aside its misreading of *American Pipe*, the court of appeals' reasoning is backwards. Limitations periods apply unless there is some "extraordinary circumstance" that requires the period to be tolled. In other words, when an individual files a claim outside the limitations period, that claim is time-barred *unless* there is some particularly compelling reason to allow it go forward. *American Pipe* and *Crown, Cork* found compelling reasons—allowing absent class members to rely on a pending class action and thereby avoid prophylactic, duplicative litigation—to permit absent class members to bring their own otherwise untimely claims. *See supra* at 23–24. But as just explained, there is no good reason to allow tolling of a limitations period so that a previously absent class member can bring another action on others' behalf. *See supra* at 24–25. In fact, allowing tolling in those circumstances would benefit only plaintiffs' counsel and lead to affirmatively negative consequences. *See supra* at 25–26. The court should thus refuse to expand the tolling of the limitations period to permit plaintiffs to assert untimely claims for not only themselves but also absent class members.

b. The court of appeals relied on three recent cases from this Court that it believed support its reasoning. But those cases are either inapposite or affirmatively refute the Ninth Circuit's conclusion.

The court of appeals cited *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), but that decision is not about tolling at all. It addressed whether, under the *Erie* doctrine, a state law limiting the certifiability of certain classes can bind federal courts sitting in diversity. *See id.* at 398. *Shady Grove* stands for the unexceptional proposition that only Congress, not a state, can create exceptions to the Federal Rules of Civil Procedure. Thus, it holds that all claims that can be brought in federal court can be aggregated under Rule 23, even if such claims could not be aggregated if brought in state court. *Id.* at 398–406. But that holding says nothing about whether *indisputably untimely* claims (like respondents') can be brought as class actions under Rule 23. To the contrary, *Shady Grove* makes clear that Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* at 408 (plurality opinion). The question whether otherwise untimely claims can nevertheless proceed is answered not under Rule 23, but under the statute of limitations and equitable tolling principles. And those principles unambiguously preclude tolling for the reasons already explained.

The court of appeals next relied on *Smith*, but that decision also did not concern *American Pipe* tolling, and its reasoning actually undermines rather than supports the conclusion below. *Smith*'s central

holding is that when class certification fails, preclusion does not apply to subsequent individual actions brought by absent class members. *See* 564 U.S. at 315. In other words, preclusion is not the proper mechanism to prevent serial re-litigation of class certification. That problem is solved by limiting *American Pipe* tolling as this Court envisioned: to individual claims. Indeed, when *Smith* did mention *American Pipe* in a footnote, it reaffirmed that decision's limitation to individual claims, explaining that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*." *Id.* at 313 n.10 (emphasis added).

Finally, the court of appeals cited *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), but it is unclear why—the decision makes no reference to *American Pipe* tolling or the interplay between statutes of limitations and class actions. The court of appeals itself described *Tyson Foods* as considering "whether class action plaintiffs could use statistical sampling evidence to prove liability to a class." App. 20a (citing 136 S. Ct. at 1046–48). That question has nothing to do with the issue presented here.

The decision below, in short, misunderstood the principles underlying *American Pipe* tolling and misconstrued the Court's class action precedents. Under a proper application of the equitable principles animating *American Pipe*, and a faithful reading of this Court's precedents, *American Pipe* tolling applies while a timely filed class action is pending to permit only the filing of otherwise untimely *individual* actions, not follow-on class actions. This Court should

grant certiorari to resolve the circuit conflict on that issue and reverse the decision below.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX A - COURT OF APPEALS OPINION

## FOR PUBLICATION

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL H. RESH, On Behalf of Himself and All Others Similarly Situated; WILLIAM SCHOENKE; HEROCA HOLDING, B.V.; NINELLA BEHEER, B.V.,

*Plaintiffs-Appellants,*

v.

CHINA AGRITECH, INC.; YU CHANG, Company's CEO, President, Secretary, and Chairman of the Board; YAU-SING TANG, AKA Gareth Tang, Company's Chief Financial Officer; GENE MICHAEL BENNETT, Director of CAGC; XIAO RONG TENG, Director of CAGC; MING FANG ZHU; LUN ZHANG DAI, Director of CAGC; CHARLES LAW, AKA Charles C. Law, AKA Charles Chien-Lee Law, AKA Charles Chien-Lee Loh, AKA Chien-Lee C. Loh, Director of CAGC; ZHENG WANG, Director of CAGC,

*Defendants-Appellees.*

No. 15-55432

D.C. No. 2:14-cv-05083-RGK-PJW

OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted December 5, 2016
Pasadena, California

Filed May 24, 2017

Before: Stephen Reinhardt, William A. Fletcher,
and Richard A. Paez, Circuit Judges.

Opinion by Judge W. Fletcher

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## OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs bring a would-be class action alleging that China Agritech, Inc. ("China Agritech") and its managers and directors violated the Securities Exchange Act of 1934 ("Exchange Act"). Plaintiffs were unnamed plaintiffs in two earlier would-be class actions against many of the same defendants based on the same underlying events. Class action certification was denied in both cases. Under *American Pipe & Construction Co v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the statute of limitations was tolled during the pendency of these two suits for plaintiffs' individual claims. There is thus no time bar preventing plaintiffs from bringing the present suit as joined individual claims rather than as a class action. The question before us is whether plaintiffs are time-barred from pursuing their suit as a class action.

For the reasons that follow, we hold that plaintiffs are not time-barred from bringing a class action.

## I. Background

China Agritech is a holding company incorporated in Delaware with its principal place of business in Beijing, China. The company claims to operate through various subsidiaries that manufacture and sell organic compound fertilizers and related products to farmers in twenty-eight Chinese provinces. China Agritech began listing its shares on the NASDAQ Stock Exchange in 2005. In a 2009 filing with the U.S. Securities and Exchange Commission ("SEC"), China Agritech reported a net revenue of $76 million, which was triple the $25 million in revenue it reported for 2005.

On February 3, 2011, LM Research, a market research company, published a report entitled "China Agritech: A Scam" ("LM Report"). The report, written by individuals who held a short position in China Agritech stock, asserted that China Agritech was "not a currently functioning business that [was] manufacturing products," but instead was "simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." Alleging idle factories, minimal investments, and fictitious contracts, the report concluded that China Agritech had "grossly inflated its revenue, failed to account for tens of millions of investor dollars, and [had] virtually no product in the market." Upon release of the LM Report, China Agritech's shares declined from $10.78 per share on February 2, 2011, to $9.85 per share on February 3, 2011.

China Agritech denied the allegations in an eight-page letter to shareholders. On February 15,

2011, Bronte Capital, a hedge fund that also held a short position in China Agritech, responded to China Agritech's letter in an article sarcastically titled, "China Agritech: China's amazing productivity levels" ("BC Article"). The BC Article contended that photos released by China Agritech in its letter did not show the most basic equipment required for operations of the magnitude that China Agritech claimed. For example, the pictures showed 40 kg fertilizer bags being moved manually by individual human laborers rather than with forklifts, calling into question how a factory reported to manufacture 100,000 tons of granular fertilizer annually could possibly operate as depicted. China Agritech's stock value declined to $7.44 per share the next day.

On March 13, 2011, China Agritech announced the formation of a Special Committee of its Board of Directors to investigate the allegations of fraud. The next day, China Agritech dismissed its independent auditor, Ernst & Young Hua Ming ("E&Y"), and publicly disclosed that E&Y had insisted, in December 2010, that the board commence an investigation of accounting problems it had previously identified. Also on March 14, 2011, NASDAQ halted trading in China Agritech stock and initiated delisting proceedings. On October 17, 2012, the SEC issued an enforcement order revoking the registration of China Agritech stock.

## II. Procedural History

### A. The *Dean* Action

On February 11, 2011, Theodore Dean, on behalf of himself and all others similarly situated, filed a would-be class action against China Agritech and

several of its managers and directors. *See Dean v. China Agritech, Inc.*, Case No. 2:11-cv-1331-RGK-PJW (C.D. Cal.) (the "*Dean* Action"). Dean alleged that China Agritech had materially misstated its net revenue and income for the third quarter in 2009 on its SEC Form 10-Q filing, and had materially misstated its net revenue and income for fiscal years 2008 and 2009 in its 2009 SEC Form 10-K filing. The complaint was filed eight days after release of the LM Report. The case was assigned to Judge Klausner in the Central District of California.

On the same day that the *Dean* Action was filed, Dean's counsel notified China Agritech shareholders of the class action through two global media platforms, Business Wire and GlobeNewswire, inviting shareholders to come forward and serve as lead plaintiff. He repeated the notification a week later. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). On April 12, 2011, pursuant to § 21D(a)(3)(B) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), six shareholders sought appointment as lead plaintiff and approval of lead counsel. On May 16, 2011, the district court denied without prejudice these motions as premature.

On June 22, 2011, Dean filed an Amended Complaint with four additional named plaintiffs and two additional defendants. The amended *Dean* Action alleged claims for violations of: (1) Section 10(b) of the Exchange Act and SEC Rule 10b-5 by China Agritech and all individual defendants; (2) Section 20(a) of the Exchange Act by the individual defendants; (3) Section 11 of the Securities Act of 1933 ("Securities Act") by all defendants; and (4) Section 15 of the Securities Act by the individual defendants.

On October 27, 2011, the district court granted China Agritech's motion to dismiss the *Dean* plaintiffs' Securities Act claims but denied its motion to dismiss the Exchange Act claims.

On January 6, 2012, the *Dean* plaintiffs moved for class certification on behalf of all persons or entities that had acquired China Agritech stock between November 12, 2009 and March 11, 2011. On May 3, 2012, the district court denied their motion. The court concluded that although the *Dean* plaintiffs had satisfied all four requirements of Rule 23(a), they failed to establish the predominance requirement of Rule 23(b)(3). Reliance is a required element for Section 10(b) securities fraud cases. The district court found that individual issues predominated because the *Dean* plaintiffs had failed to establish a fraud-on-the-market presumption of reliance. A fraud-on-the-market theory requires a showing of market efficiency, which, in the view of the district court, plaintiffs had not made. The court therefore held that plaintiffs had to establish individualized reliance to support their claims.

The *Dean* plaintiffs appealed the denial of certification under Rule 23(f). On August 8, 2012, we affirmed. *See Dean v. China Agritech, Inc.*, Case No. 12-80120 (9th Cir.), Dkt. No. 5. The *Dean* plaintiffs continued litigating their cases as individuals. They settled their individual claims on September 14, 2012. Based on the settlement, their individual claims were dismissed with prejudice on September 20, 2012.

### B. The *Smyth* Action

On October 4, 2012, three weeks after the *Dean* Action settled, Kevin Smyth filed an almost identical class-action complaint on behalf of the same would-be class against China Agritech in federal District Court for the District of Delaware. *See Smyth v. Chang*, Case No.1:12-cv-01262-RGA (D. Del.) (the "*Smyth* Action"). The *Smyth* and *Dean* Action complaints differed only in that the *Smyth* Action alleged solely Exchange Act violations and did not name several of the defendants that had been named in the *Dean* Action. The *Smyth* Action was filed one year and eight months after the LM Report was published.

On December 7, 2012, following notification of the *Smyth* Action on Business Wire, pursuant to the PSLRA, eight shareholders sought appointment as lead plaintiff and approval of their selection of lead counsel. The *Smyth* Action was subsequently transferred to the Central District of California, where it was deemed related to the *Dean* Action and assigned to Judge Klausner (Case No. 2:13-cv-3008-RGK-PJW (C.D. Cal.)). On July 18, 2013, plaintiffs in the *Smyth* Action filed an amended complaint with several additional named plaintiffs. On August 5, 2013, the *Smyth* plaintiffs moved for class certification.

On September 26, 2013, the district court denied the motion. The court found that the *Smyth* plaintiffs' personal claims failed the typicality requirement of Rule 23(a)(3) because their prior relationship with named plaintiffs in the *Dean* Action subjected them to a claim preclusion defense that was not available against unnamed class members. The

court further held that the *Smyth* plaintiffs and their counsel failed to meet the adequate representation requirement of Rule 23(a)(4). The court noted that plaintiffs had failed to modify their lead plaintiff certifications that had been signed twenty-nine months earlier in connection with the *Dean* Action, and had served only one defendant ten months after filing *Smyth*.

On January 8, 2014, the parties to the *Smyth* Action agreed to dismiss the action with prejudice as to the named plaintiffs.

C. The *Resh* Action

On June 30, 2014, Michael Resh filed a would-be class action against China Agritech and several individual defendants (the "*Resh* Action"). On September 4, 2014, Resh filed an amended complaint with several additional named plaintiffs. The *Resh* plaintiffs alleged violations of Sections 10(b) and 20(a) of the Exchange Act based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions. The case was assigned, like the others, to Judge Klausner.

On September 3, 2014, the CAGC Investor Group, comprised of investors in China Agritech—William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V.—filed a motion for appointment as lead plaintiff and for approval of its selection of counsel for the proposed class. On September 22, 2014, China Agritech and one of the individual defendants, Charles Law, filed motions to dismiss the complaint on the theory that the *Resh* plaintiffs' would-be class action was time-barred under the Exchange Act's

two-year statute of limitations. On October 17, 2014, the district court denied without prejudice the CAGC Investor Group's motion, deferring consideration until consideration of class certification ("October 2014 Order").

On December 1, 2014, the district court granted China Agritech's and Defendant Law's motions to dismiss without leave to amend ("December 2014 Order"). Plaintiffs had argued that their would-be class action was timely because *American Pipe* tolled the statute of limitations during the pendency of the *Dean* and the *Smyth* actions. With tolling, 804 of the 1243 days that had elapsed since the release of the LM Report were subtracted, meaning that only 439 days counted towards the two-year statute of limitations. The district court disagreed. It concluded that while the Supreme Court in *American Pipe* and *Crown, Cork & Seal* held that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class, and that a class member may therefore file a separate individual action prior to the expiration of his or her own limitations period, the Supreme Court had not yet determined whether *American Pipe* allowed tolling for an entirely new class action based upon a substantially identical class. Relying principally on *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), and *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), the district court concluded that the statute of limitations was tolled for the individual claims of the named plaintiffs in the *Resh* Action, but was not tolled for plaintiffs' would-be class action. In the view of the district court, a contrary ruling "would allow tolling to extend indefi-

nitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence."

On December 19, 2014, the *Resh* plaintiffs sought reconsideration, arguing that the court had denied class certification in the *Dean* and *Smyth* Actions due to issues related to the lead plaintiffs' suitability as class representatives rather than the claims' suitability for class treatment. On January 7, 2015, the district court dismissed the remaining defendants ("January 2015 Order"). On February 23, 2015, it denied plaintiffs' motion for reconsideration ("February 2015 Order"), explaining that "Plaintiffs' class action claims were time-barred regardless of the grounds on which class certification was denied in the two earlier actions."

The *Resh* plaintiffs appealed, challenging the district court's October 2014, December 2014, January 2015, and February 2015 Orders.

## III. Standard of Review

We review de novo a district court's order dismissing a suit on statute of limitations grounds. *Sharkey v. O'Neal*, 778 F.3d 767, 770 (9th Cir. 2015).

## IV. Jurisdiction

We have jurisdiction under 28 U.S.C. § 1291. Defendants argue that the orders are not appealable final orders because the district court indicated that plaintiffs' individual claims could proceed. We disagree. The district court stated, "Plaintiffs are not prevented from filing a complaint asserting individual, rather than class action, claims . . . if they so

choose." However, this statement did not affect the finality of the court's dismissal "without leave to amend" of the class action complaint that plaintiffs had filed. An invitation to file a complaint in a separate individual suit does not render non-appealable the district court's dismissal.

Defendants also assert that under Federal Rule of Appellate Procedure ("FRAP") 4(a)(7)(A)(ii), plaintiffs were required to wait 150 days after the district court's December 2014 and February 2015 orders before they appealed because the district court's judgment had not been set forth in a separate document, as required under Federal Rule of Civil Procedure ("Rule") 58(a). However, under FRAP 4(a)(7)(B), "[a] failure to set forth a judgment or order on a separate document when required by . . . Rule 58(a) does not affect the validity of an appeal from that judgment or order." "[N]either the Supreme Court nor this court views satisfaction of Rule 58 as a prerequisite to appeal." *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003). Because the district court's order was a full adjudication of the issues that clearly evidenced its intention that the order be final, appellate jurisdiction is proper. *See Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997).

## V. Discussion

We must decide whether the would-be class action brought by the *Resh* plaintiffs is time-barred. It is undisputed that the earlier *Dean* and *Smyth* Actions were timely. It is also undisputed that, under *American Pipe* and *Crown, Cork & Seal*, the statute of limitations for the individual claims of would-be

class members in the *Dean* and *Smyth* Actions was tolled during the pendency of both of those actions. That is, there is no time bar to individual claims brought by plaintiffs who were unnamed class members in the *Dean* and *Smyth* Actions, whether brought as separate or joined claims. The question before us is whether plaintiffs' would-be class action, based on those same claims, is time-barred.

A. *American Pipe and Crown, Cork & Seal*

The Supreme Court has twice addressed tolling issues arising out of the dismissal of a would-be class action when no class has been certified. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court held that unnamed members of an uncertified class could intervene as individual plaintiffs in the individual suit that remained even if the statutory limitations period had passed. *Id.* at 550–56. According to the Court, "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553. The Court characterized its tolling rule as serving policies underlying statutes of limitations as well as class actions. Recognizing that limitations periods serve "[t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,'" *id.* at 554, the Court concluded that such policies would be vindicated when a named plaintiff "commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.*

at 554–55. Not permitting tolling would frustrate the goal of Rule 23 to promote economy in litigation because, absent tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553.

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Supreme Court extended *American Pipe* to permit tolling not only for individual intervention in the named plaintiffs' original suit, but also for individual filing of entirely new suits. The Court wrote that many of "the same inefficiencies [discussed in *American Pipe*] would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification." *Id.* at 350. Specifically, if the statute of limitations for new individual claims were not tolled, "[t]he result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. Because the commencement of a class suit already "put[s] defendants on notice of adverse claims," the goals underlying statutes of limitations would not be undermined by a broader tolling rule. *Id.* at 352. The Court concluded, "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

B. *Catholic Social Services* and Later Cases

Under *American Pipe* and *Crown, Cork & Seal*, it is clear that the individual claims of the would-be class members in the *Resh* Action have been tolled during the pendency of earlier class actions. Those class members may intervene in existing individual suits, or may bring entirely new individual suits. Plaintiffs bringing new suits may sue either separately or jointly. *American Pipe* and *Crown, Cork & Seal* leave open the question whether such plaintiffs may bring a new suit as a class action.

In a short opinion published thirty years ago, we held that "the pendency of a class action [does not] toll[] the applicable statutes of limitation for a subsequently filed class action." *Robbin v. Fluor Corp.*, 835 F.2d 213, 213 (9th Cir. 1987). Relying principally upon a Second Circuit opinion, we concluded that "extend[ing] tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" *Id.* at 214 (citing *Korwek v. Hunt*, 827 F.2d 874, 879 (2d. Cir. 1987)). In *Korwek*, our sister circuit had held that "the tolling doctrine enunciated in *American Pipe* does not apply to permit a plaintiff to file a subsequent class action following a definitive determination of the inappropriateness of class certification." 827 F.2d at 879. Its rationale was that "[t]he Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Id.*

We modified *Robbin* in 2000. In *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), the district court had certified a class, but an intervening change in the law eliminated subject matter jurisdiction over the claims of the named plaintiffs. *Id.* at 1143–44. New plaintiffs then brought a second class action based on the same underlying facts against the same institutional defendants. *Id.* at 1144. The question before us was whether the pendency of the prior class action tolled the statute of limitations for the second action. *Id.* at 1145. We held that it did. *Id.* at 1149. In so holding, we clarified the analytic structure in which the *American Pipe* tolling analysis applies to future class actions:

> There is no dispute that if members of the class . . . had filed individual actions after the dismissal of their class action, the statute of limitations would have been tolled for those individual actions. . . . The only question in this case is whether those same plaintiffs should be permitted to aggregate their individual actions into a class action. *Strictly speaking, this is not a statute of limitations question at all. It is, rather, a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class action to litigate those actions.*

*Id.* at 1147 (emphasis added).

Defendants read our opinion in *Catholic Social Services* as denying tolling for plaintiffs in certain

categories of class action denials. They rely principally on a passage in which we wrote, "If class action certification had been denied in [an earlier case], and if plaintiffs in this action were seeking to relitigate the correctness of that denial, we would not permit plaintiffs to bring a class action." *Id.* Two of our sister circuits may have read *Catholic Social Services* similarly. *See Yang v. Odom*, 392 F.3d 97, 107 (3d Cir. 2004) ("*Catholic Social Services* can be read as authority for our holding that class claims should be tolled where the district court denies class certification based on deficiencies of a class representative, and not on the validity of the class itself."); *Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) ("Whether the *American Pipe* rule applies to subsequent class actions . . . depends on the reasons for the denial of certification of the predecessor action.").

This is a misreading of *Catholic Social Services*. We did indeed write that "we would not permit plaintiffs to bring a class action" if they sought to serially re-litigate a previous denial of certification. 232 F.3d at 1147. However, we did not write that the availability of a subsequent class action depended on general tolling principles. Rather, its availability depended on the operation of preclusion and preclusion-related principles. *See id.* For example, if plaintiffs in *Catholic Social Services* had been named plaintiffs in the earlier suit, if an issue relating to the propriety of the class action had been resolved against them, if their earlier suit had been dismissed with prejudice based on that ruling, and if plaintiffs had then sought to bring a new class action raising

that same issue, they would have been barred by issue preclusion from raising that issue.

Three recent Supreme Court decisions have confirmed this view. First, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the Court rejected an argument by defendant Allstate that only certain categories of claims are eligible for class treatment under Rule 23. The Court wrote:

> There is no reason . . . to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions. Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. But that is *exactly* what Rule 23 does[.]

*Id.* at 399 (emphases in original and internal citation omitted). *Shady Grove* directs us, for purposes of class certification, to look only to the criteria of Rule 23 and not to "some other law." There is nothing in the certification criteria of Rule 23 that tells us to look to whether the statute of limitation has, or has not, been tolled. That is, the statute of limitations is not part of Rule 23 but is, instead, "some other law."

After *Shady Grove*, the Seventh Circuit explicitly adopted our general approach in *Catholic Social Services* in treating the issue of successive would-be class actions as an issue of preclusion rather than tolling. In *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), the court

held that the overarching inquiry in determining whether prior class actions can toll future class actions is "not the statute of limitations or the effects of tolling, but the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." *Id.* at 563. "To the extent that [another court] may believe that Rule 23 must be set aside when a suit's timeliness depends on a tolling rule, that view cannot be reconciled with the Supreme Court's later decision in *Shady Grove* . . . , which holds that Rule 23 applies to all federal civil suits, even if that prevents achieving some other objective that a court thinks valuable." *Id.* at 564.

Second, in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), the Court refused to allow a federal district court to enjoin a state court from certifying a class. The federal court had denied class certification of a class in a would-be class action against Bayer. *Id.* at 304. A parallel would-be class action was pending in state court, brought by different named plaintiffs than the named plaintiffs in federal court. *Id.* at 303. After the federal court ruled, it enjoined the state court from certifying the class in the case before that court, relying on the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. *Id.* at 304–05. The Supreme Court reversed, pointing out, *inter alia*, that the named plaintiffs in the state court suit had been unnamed members of the uncertified class in federal court, and that they had thus never been made parties to the federal court suit. *Id.* at 316–18. In that circumstance, there was no basis to apply formal preclusion principles against them, and thus no basis to enjoin the state court from certifying the class action. *Id.*

The Court in *Smith* acknowledged Bayer's argument that "serial relitigation of class certification" was unfair to defendants, and that defendants "would be forced in effect to buy litigation peace by settling." *Id.* at 316 (internal quotation marks omitted). The Court responded that Bayer's "form of argument flies in the face of the rule against nonparty preclusion." *Id.* Its answer to Bayer's concern was that traditional principles of *stare decisis* and comity, combined with the possibility of removal under the Class Action Fairness Act or consolidation by the Panel on Multidistrict Litigation, were adequate to the task of protecting defendants. *Id.* at 316–18. Though the question of sequential class action litigation in two or more federal courts, as distinct from such litigation in federal and state court, was not presented in the case before it, the Court nonetheless addressed that question. The troublesome case, of course, is one in which the plaintiffs were unnamed plaintiffs in an earlier uncertified class action in federal court and were therefore not subject to issue preclusion, and in which the plaintiffs later seek to bring an identical or substantially similar would-be class action in federal court. With respect to such a case, the Court wrote, "[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317.

Two years later, the Sixth Circuit had occasion to apply both *Shady Grove* and *Smith*. In *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), with respect to tolling, the Sixth Circuit cited and followed the Seventh Circuit's decision in *Sawyer*. *Id.* at 652. With respect to preclusion, the court relied

on *Smith*. Wal-Mart, like Bayer in *Smith*, objected that allowing repeated litigation of class action certification questions by different named plaintiffs would force defendants "to settle to buy peace." *Id.* at 653. The court responded that Wal-Mart's concerns "need not bar legitimate class action lawsuits or distort the purposes of *American Pipe* tolling. Instead, we follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns." *Id.*

Third and finally, in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–48 (2016), the Supreme Court considered whether class action plaintiffs could use statistical sampling evidence to prove liability to a class. The Court held that they could, reasoning that "[i]n a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." *Id.* at 1046. To hold otherwise would be to "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)). We recognize that for purposes of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules Enabling Act, statutes of limitation occupy a no-man's land between substance and procedure. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949) (in a suit based on state-law cause of action applying state tolling rule rather than Federal Rule of Civil Procedure 3); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 748–53 (1980) (same); *West v. Conrail*, 481 U.S. 35, 37–40 (1987) (in

a suit based on a federal-law cause of action applying Rule 3). We therefore do not regard the Court's reasoning in *Tyson Foods* as compelling a holding that the Rules Enabling Act requires that the statute of limitations apply the same way in both individual and class actions. But *Tyson Foods*, when read in combination with *Shady Grove* and *Smith*, nonetheless reinforces our conclusion that the statute of limitations does not bar a class action brought by plaintiffs whose individual actions are not barred.

### C. Plaintiffs' Would-be Class Action Is Not Time-barred

We conclude, based on *American Pipe* and *Crown, Cork & Seal*, read in the light of *Shady Grove*, *Smith* and *Tyson Foods*, that permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place. The rule creates no unfair surprise to defendants because the pendency of a prior class suit has already alerted them "not only [to] the substantive claims being brought against them, but also [to] the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. The rule also promotes economy of litigation by reducing incentives for filing duplicative, protective class actions because "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." *Crown, Cork & Seal*, 462 U.S. at 350–51.

We further conclude, based on *Smith*, that to the degree that our conclusion may be thought likely to lead to abusive filing of repetitive class actions, the current legal system is adequate to respond to such a concern. First, if it is clear that a proposed class is not viable under Rule 23, as evidenced by an earlier federal court decision, potential future plaintiffs (or, more precisely, their attorneys) will have little to gain from repeatedly filing new suits. Attorneys who are going to be paid on a contingency fee basis, or in some cases based on a fee-shifting statute, at some point will be unwilling to assume the financial risk in bringing successive suits. Second, ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class action certification.

In light of the above, we conclude that plaintiffs' class action complaint is not time-barred. Plaintiffs' individual claims were tolled under *American Pipe* and *Crown, Cork & Seal* during the pendency of the *Dean* and *Smyth* Actions. So long as they can satisfy the criteria of Rule 23, and can persuade the district court that comity or preclusion principles do not bar their action, they are entitled to bring their timely individual claims as named plaintiffs in a would-be class action.

## Conclusion

We hold that plaintiffs' class action claims are timely. Because we so hold, we do not reach plaintiffs' additional arguments. We reverse the district

court's order of dismissal and remand for further proceedings consistent with this opinion.

**REVERSED** and **REMANDED.**

## APPENDIX B - DISTRICT COURT DECEMBER 1, 2014 OPINION

## UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No. CV 14-05083-RGK (PJWx)

Date December 1, 2014

Title ***RESH, et al. v. CHINA AGRITECH, INC., et al.***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)
Deputy Clerk

Not Reported
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

**Proceedings: (IN CHAMBERS) Order re: Defendants Charles Law and China Agritech, Inc.'s Motions to Dismiss (DE 27, 28)**

## I. INTRODUCTION

On September 4, 2014, Michael H. Resh ("Resh"), William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V. (collectively, "Plaintiffs") filed an Amended Class Action Complaint ("FAC") against China Agritech, Inc. ("China AG") and members of

the company's executive management team and board of directors ("Individual Defendants"). Plaintiffs allege violations of: (1) Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Securities and Exchange Commission ("SEC") Rule 10b-5 against China AG and Individual Defendants; and (2) Section 20(a) of the Exchange Act against Individual Defendants. Among the Individual Defendants named in the FAC is Charles Law ("Defendant Law" or "Law").

Plaintiffs bring this class action on behalf of all persons and entities who purchased the publicly traded common stock of China AG between November 12, 2009 and March 11, 2011 (the "Class Period"). Class actions on behalf of classes identical to that in the present case have been filed with this Court on two prior occasions, in actions entitled *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx), 2011 WL 5148598 (C.D. Cal. Oct. 27, 2011), and *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012).

Presently before the Court are motions to dismiss filed by China AG and Defendant Law (the "Moving Defendants"). In Defendant Law's motion, he joins in China AG's motion, and adopts and incorporates it by reference. (*See* Defendant Law's Mot. 1 n.1, 18:2-5.) For the following reasons, the Court **GRANTS** Moving Defendants' motions.

## II. FACTUAL BACKGROUND

China AG is a holding company incorporated in the state of Delaware with its principal place of business in Beijing, China. China AG manufactures and distributes organic compound fertilizers for ag-

ricultural application in China. The company was publicly traded within the United States as a result of a financial technique known as a "reverse merger." In a reverse merger, a private company seeking to trade or sell shares in public equity markets acquires a publicly traded shell company in order to quickly go public and avoid certain regulatory requirements. Once the reverse merger is complete, management of the former private company generally takes control of the merged company. China AG completed its merger in 2005 and began publicly offering its stock on the NASDAQ stock exchange. On October 17, 2012, the SEC issued an enforcement order revoking the registration of China AG's stock.

Defendant Law was a director of China AG from January 2010 until his resignation in February 2011. During this time, Law also served on the Compensation and Nominating and Governance Committees. In 2005, prior to Defendant Law's appointment as a director, his law firm, King & Wood, represented China AG in connection with its initial reverse merger registration.

Plaintiffs are four individual investors who allegedly purchased China AG's common stock between November 12, 2009 and March 11, 2011.

A. Alleged Wrongful Conduct

Plaintiffs allege that China AG materially misstated its net revenue and income for the third quarter of 2009 on its SEC Form 10-Q filing. Plaintiffs allege that China AG also materially misstated its net revenue and income for fiscal years 2008 and 2009 in its 2009 SEC Form 10-K filing. Plaintiffs further allege that Defendants concealed related-

party transactions between a China AG subsidiary and a third-party supplier owned by one of the Individual Defendants.

On February 3, 2011, Lucas McGee Research published a report ("LM Report") contending that China AG was a fraud and alleging that the company's factories were either non-operational or were producing far less than reported. The report further stated that China AG had filed financial statements with the SEC for fiscal year 2009 that showed substantially larger net revenue than China AG reported in filings to the Chinese State Administration for Industry and Commerce ("SAIC") for the same period. After publication of the report, the value of China AG stock declined from $10.78 per share on February 2, 2011, to $9.85 per share on February 3, 2011, representing a day-over-day decline of 8.63%. On February 15, 2011, Bronte Capital issued a report ("BC Report") with similar allegations about China AG's production levels. China AG's stock value again declined from $9.21 per share on February 4, 2011 to $7.44 per share on February 16, 2011, a decline of approximately 16%. As a result of Defendants' actions, Plaintiffs allegedly suffered damages in connection with the purchase of their China AG stock.

Plaintiffs allege that during this time, Individual Defendants, including Defendant Law, acted as controlling persons of China AG. Each of these Individual Defendants had direct and supervisory involvement in the day-to-day operations of China AG and were directly or indirectly involved in the dissemination of the various fraudulent statements.

**B. Related Cases**

As discussed, class actions involving substantially similar allegations against China AG and classes identical to the present one proposed by Plaintiffs have previously been filed twice before this Court.

The complaint in *Dean* was filed on February 11, 2011. On May 3, 2012, this Court denied the *Dean* plaintiffs' motion for class certification because the plaintiffs failed "to establish that questions of law or fact common to class members predominate[d] over any questions affecting only individual members," as was necessary for class certification pursuant to Federal Rule of Civil Procedure ("Rule") 23(b)(3). (Order Den. Mot. Class Cert. at 7, *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx) (C.D. Cal. Oct. 27, 2011), ECF No. 134.)

Subsequently, the complaint in *Smyth* was filed on October 4, 2012. On September 26, 2013, this Court denied the *Smyth* plaintiffs' motion to certify the class. (Order Den. Mot. Class Cert., *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012), ECF No. 112.) The motion was denied largely because plaintiffs failed to satisfy the "typicality" and "adequacy of representation" requirements of Rule 23(a)(3)-(4). (*Id.* at 4-7.) On January 2, 2013, all claims asserted by plaintiffs were voluntarily dismissed with prejudice. (*See generally* Order Granting Mot. Dismiss, *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012), ECF No. 136.)

## III. JUDICIAL STANDARD

Under Rule 12(b)(6), a party may move to dismiss for failure to state a claim upon which relief may be

granted. Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, the court must assume allegations in the challenged complaint are true, and construe the complaint in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Although the complaint need not contain detailed factual allegations, it must provide more than a "formulaic recitation of the elements of a claim." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Furthermore, a pleading must contain sufficient factual matter that, if accepted as true, states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when there are sufficient factual allegations to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* Dismissal is appropriate "only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mediondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

## IV. DISCUSSION

### A. Plaintiffs' Class Action Is Barred by the Statute of Limitations

Moving Defendants argue that Plaintiffs' class action claims are barred by the statute of limitations and, therefore, should be dismissed. The Court agrees.

A securities fraud claim must be filed no later than the earlier of (1) two years after the facts constituting the violation were, or reasonably should have been, discovered, or (2) five years after the violation occurred. 28 U.S.C. § 1658(b); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (holding "that 'discovery' as used in this statute encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known."). Here, Plaintiffs do not contest that the LM and BC Reports, published in February 2011, sufficiently provided notice that the alleged fraud occurred. As such, the two-year statute of limitations began to run at that time. Three years later, in June 2014, Plaintiffs filed their original Complaint.

Plaintiffs do not dispute that, absent the *Dean* and *Smyth* actions, the statute of limitations would have run by the time they filed their Complaint. Instead, Plaintiffs assert that the statute of limitations was tolled during the pendency of the foregoing actions, and the Complaint was therefore timely. In order for Plaintiffs to succeed in this argument, the Court must find that the statute of limitations tolled during the pendency of not only one, but *both* of the prior actions.

The commencement of a class action can suspend the applicable statute of limitations, but only under certain circumstances. In *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that if the statute of limitations expires during the pendency of a class action, "the commencement of the original class suit tolls the running of the statute for all purported members of

the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553-54. In *Crown, Cork & Seal Company v. Parker*, 462 U.S. 345 (1983), the Supreme Court expanded on its opinion in *American Pipe*, ruling that tolling is appropriate not only where plaintiffs sought to intervene in a continuing action, but also where they sought to file an entirely new action as individual plaintiffs. *Id.* at 349-50, 353-54. The Supreme Court has not, however, determined whether tolling allows the above-mentioned individuals to bring an entirely new *class action* based upon a substantively identical class. This is the issue presently before the Court.

The Ninth Circuit first addressed this issue in *Robbin v. Fluor Corporation*, 835 F.2d 213 (9th Cir. 1987). There, similar to the present case, a securities fraud class action was filed after a class action based on the same alleged fraud had been denied certification and voluntarily dismissed. *Id.* at 214. The applicable statute of limitations had expired, and the Ninth Circuit held that the statute of limitations was not tolled as to the class action during the prior action. *Id.* In reaching its decision, the court recognized that several out-of-circuit courts had rejected the position that "the tolling doctrines of *American Pipe* and *Crown, Cork* should be extended to include class members who file subsequent class actions." *See id.* (citing *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir.1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir.1985), *cert. denied*, 475 U.S. 1035 (1986)). The court agreed with those decisions, and held "that to extend tolling to class actions 'tests the outer limits of the *Ameri-*

*can Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" *Robbin*, 835 F.2d at 214 (quoting *Korwek*, 827 F.2d at 879).[1]

Plaintiffs do not address *Robbin*. Instead, Plaintiffs cite to *Catholic Social Services, Inc. v. I.N.S.*, 232 F.3d 1139 (9th Cir. 2000) (en banc) as support for the proposition that tolling applies to the class action as long as class certification has not been previously denied on the ground that the claims were not suitable for class treatment. However, *Catholic Social Services* does not provide such support.

In *Catholic Social Services*, the Ninth Circuit found that tolling was warranted where the class had originally been certified on two occasions, but was dismissed after a statutory enactment stripped the courts of jurisdiction over certain of plaintiffs' claims. 232 F.3d at 1144-49. Following the dismissal, plaintiffs promptly filed a new class action with the district court. *Id.* at 1144. Although the new class action was filed after the statute of limitations had expired, the Ninth Circuit held that "the statute of limitations was tolled during the pendency of the first class action[.]" *Id.* at 1150. In doing so, the court emphasized that "there is no dispute in the case that the classes in the first action were properly certified." *Id.* at 1149.

The court was careful to distinguish two sets of cases. The first was *Robbin* (in turn relying on *Kor-*

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[1] In *Robbin*, the court held that the tolling doctrine of *American Pipe* did apply to preserve an *individual* action that was filed along with the class action. 835 F.2d at 215.

*wek*, 827 F.2d 874), in which the Ninth Circuit "interpreted *American Pipe* not to allow tolling . . . when the second action is no more than an attempt to relitigate the issue of class certification and thereby to circumvent the earlier denial." *Id.* at 1147. The second set of cases were decided by the Eleventh, Fifth, and Sixth Circuits, as well as various district courts, which applied the rule in *Robbin* and *Korwek* "to cases in which a later class of plaintiffs [did] not disagree with the denial of class certification, but rather [tried] to cure the deficiency that led to the denial." *Id.* at 1147-48 (citing *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); *Salazar–Calderon*, 765 F.2d 1334, 1351 (5th Cir. 1985)). The court explained that "[p]laintiffs in the class action now before us . . . do not seek to cure any procedural deficiencies in the classes under Rule 23 certified in the first action because there were none." *Id.* at 1149. The court's ultimate holding therefore turned on the fact that "[p]laintiffs in this case are not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Id.*

*Catholic Social Services* does not support Plaintiffs' argument in the present case. Unlike in *Catholic Social Services*, where the class was properly certified twice, here class certification has been denied on two separate occasions in the *Dean* and *Smyth* actions. Whether the Court construes the current class action as an attempt to relitigate the two earlier denials or to correct procedural deficiencies in the earlier would-be classes, *Catholic Social Services* indicates that tolling does not apply.

Plaintiffs appear to read the Ninth Circuit's use of the term "procedural deficiencies" as referring solely to deficiencies related to the lead plaintiff's suitability as class representative, to the exclusion of deficiencies related to the suitability of the claims for class treatment. (*See* Pls.' Opp'n 13:6-14:3.) However, the Court finds no support in *Catholic Social Services* for such an interpretation. To the contrary, that decision indicates that the term "procedural deficiencies" does in fact apply to the suitability of claims for class treatment. As discussed, the Ninth Circuit was careful to distinguish, among other cases, the Fifth Circuit's decision in *Salazar-Calderon*, and at least implicitly approved of that decision. In discussing *Salazar-Calderon*'s holding that tolling was improper, the Ninth Circuit noted that class certification in that case "was denied for failure to satisfy the predominance and superiority criteria of Rule 23(b)(3)." *Catholic Social Services*, 232 F.3d at 1148. This failure fundamentally goes to the suitability of the claims for class treatment, and has nothing to do with the suitability of the class representative.

Plaintiffs also cite two Central District of California decisions rendered post-*Catholic Social Services*, but those decisions are similarly unavailing. First, *In re Toys "R" Us*, No. MDL 08-01980-MMM (FMOx), 2010 WL 5071073 (C.D. Cal. Aug. 17, 2010), affirms the Ninth Circuit's focus on whether the Plaintiff is seeking to relitigate an earlier denial of certification or correct a procedural defect. *Id.* at *14. It did not parse the term "procedural," as Plaintiffs do, and the issue of tolling arose in the unrelated context of plaintiffs seeking to certify subclasses in a piecemeal fashion. *Id.* at *14-15. The second case, *In re Ameri-*

*can Funds Securities Litigation*, 556 F. Supp. 2d 1100 (C.D. Cal. 2008), was vacated and remanded on appeal. *See* 395 F. App'x 485 (9th Cir. 2010). In any event, the district court's decision actually undermines Plaintiffs' position. In *American Funds Securities Litigation*, the court noted *Catholic Social Services*' emphasis on the fact that the class had been properly certified in the first instance. 556 F. Supp. 2d at 1112. It then went on to distinguish *Catholic Social Services* and find that tolling was not proper in part because – as is true in the present case – "no class has ever been certified by this Court . . . ." *Id.*

Even if the Court were to adopt Plaintiffs' interpretation of the law, tolling would still be impermissible. The Court previously denied certification of this same putative class in the *Dean* action on the ground that the claims were not suitable for class treatment. Specifically, the Court found that plaintiffs failed to establish the "predominance" requirement of Rule 23(b)(3).

A plaintiff asserting securities fraud under Section 10(b) of the Exchange Act must prove that he or she relied upon a material misrepresentation when purchasing stock. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 242-43 (1988). To invoke a presumption of reliance in showing that it can be determined on a class-wide rather than individual basis, plaintiffs must establish that the defendant made a material misrepresentation that directly caused the rise in stock. *See Connecticut Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1172 (9th Cir. 2011). In *Dean*, this Court found that the plaintiffs' expert, and as a result the plaintiffs, failed to establish "a causal relationship between [China AG's] disclosures

and movement in the price of its stock." (Order Den. Mot. Class Cert. at 7, *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx) (C.D. Cal. Oct. 27, 2011), ECF No.134.) As such, the plaintiffs were unable to invoke the presumption of reliance and therefore failed to show that the issue of reliance could be determined on a class-wide, rather than individual, basis. It was for this reason that class certification was denied.

Plaintiffs argue that this denial "was based upon the particular lead plaintiffs' experts' deficiencies rather than any suitability of the claims for class treatment." (Pls.' Opp'n 8:5-8:7, ECF No. 35.) Put differently, Plaintiffs argue that class certification was denied not because the claims were not suitable for class certification, but rather, because the plaintiffs *failed to establish* that the claims were not suitable for class certification. The Court finds this argument unpersuasive, as it would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence.

For the foregoing reasons, the Court finds that the statute of limitations did not toll as to a class action during the pendency of the *Dean* or *Smyth* actions. Therefore, Plaintiffs' claims are barred as untimely. Further, because amendment "could not possibly cure th[is] deficiency," *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir. 2008), the Court **grants** Moving Defendants' Motions to Dismiss without leave to amend.

### B. Defendant Law's Remaining Arguments

Defendant Law also argues that Plaintiffs' FAC fails to state a claim for relief pursuant to Rule 12(b)(6). Defendant Law argues that Plaintiffs' FAC, as it relates to him, fails to allege facts sufficient to satisfy the heightened pleading standards of Rule 9(b) and the Private Securities Litigation Reform Act. However, as the Court is dismissing the FAC on other grounds, it need not decide this issue.

## V. CONCLUSION

For the foregoing reasons, the Court **GRANTS without leave to amend** Moving Defendants' Motions to Dismiss. Plaintiffs are hereby ordered to show cause in writing no later than December 8, 2014 as to why the Motions to Dismiss should not be granted as to the remaining defendants.

**IT IS SO ORDERED.**

## APPENDIX C - DISTRICT COURT FEBRUARY 23, 2015 OPINION

## UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No. CV 14-05083 RGK (PJWx)

Date February 23, 2015

Title ***RESH, et al. v. CHINA AGRITECH, INC., et al.***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)
Deputy Clerk

Not Reported
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

**Proceedings: (IN CHAMBERS) Order Re: Plaintiffs' Motion for Reconsideration (DE 45)**

### I. INTRODUCTION

On September 4, 2014, Michael H. Resh, William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V. (collectively, "Plaintiffs") filed an Amended Class Action Complaint ("FAC") against China

Agritech, Inc. ("China AG") and members of the company's executive management team and board of directors ("Individual Defendants"). Plaintiffs alleged violations of: (1) Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Securities and Exchange Commission ("SEC") Rule 10b-5 against China AG and Individual Defendants; and (2) Section 20(a) of the Exchange Act against Individual Defendants. Among the Individual Defendants named in the FAC was Charles Law ("Law").

Plaintiffs brought this class action on behalf of all persons and entities who purchased the publicly traded common stock of China AG between November 12, 2009 and March 11, 2011. Class actions on behalf of classes identical to that in the present case had been filed with this Court on two prior occasions, in actions entitled *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx) (C.D. Cal. filed Feb. 11, 2011), and *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012).

On September 22, 2014, China AG and Law filed motions to dismiss the FAC. On December 1, 2014, the Court granted both motions without leave to amend on the ground that Plaintiffs' class action claims were barred by the statute of limitations. (*See* ECF No. 43.)

Presently before the Court is Plaintiffs' Motion for Reconsideration (the "Motion"). For the following reasons, the Court **DENIES** the Motion.

## II. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 59(e), a "motion to alter or amend a judgment must

be filed no later than 28 days after the entry of judgment." A court should grant the motion "sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Thus, "amendment or alteration is appropriate . . . if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law." *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 420 F. Supp. 2d 1070, 1075 (N.D. Cal. 2006).

California Local Rule 7-18 provides that a motion for reconsideration may be made only on the grounds of:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. L.R. 7-18.

A "motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate reasons why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Francis v. Bryant*, CV F 04 5077 AWI, 2006 WL 1627917, at *1 (E.D. Cal. June 7, 2006) (citing *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996)). A motion for reconsideration should not be used to reargue the motion or present evidence that should have been presented prior to the entry of judgment. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (citations omitted).

## III. DISCUSSION

Plaintiffs base their Motion for Reconsideration on four grounds. The Court addresses each in turn.

### A. Tolling of Individual Claims

First, Plaintiffs assert that the Court failed to consider the material "fact" that Plaintiffs' individual claims are tolled and not barred by the statute of limitations. Even assuming this qualifies as a "fact" under subsection (c) of Local Rule 7-18, the Court did not fail to consider it. To the contrary, the Court noted the Ninth Circuit's holding in *Robbin v. Fluor Corporation*, 835 F.2d 213, 215 (9th Cir. 1987), that tolling applies to an individual action even though the class action is barred. (*See* ECF No. 43 at 4 n.1.) In keeping with that holding, the Court held that "the statute of limitations did not toll *as to a class action* during the pendency of the *Dean* or *Smyth* actions," and dismissed "Plaintiffs' class action Com-

plaint with prejudice." (*Id.* at 6 (emphasis added).) As the Court noted in its order dated January 7, 2015, "Plaintiffs are not prevented from filing a complaint asserting individual, rather than class action, claims against [the defendants] if they so choose." (ECF No. 50.)

**B. Grounds for Denial of Class Certification in *Dean***

Plaintiffs next argue that the Court erred in finding that it denied class certification in the *Dean* action on the ground that the claims were not suitable for class treatment. In their opposition to China AG's motion to dismiss, Plaintiffs maintained that unless class certification was denied on that ground, rather than due to issues related to the lead plaintiff's suitability as class representative, Plaintiffs' claims were not time-barred.

Yet Plaintiffs simply seek to reargue an issue they already briefed in their opposition. (*See, e.g.*, ECF No. 35 at 7:5-8:19, 9:13-10:9, 12:12-15:18.) This is improper, as "[a] motion for reconsideration is not a vehicle to reargue the motion." *Brown v. U.S.*, Nos. CV 09-8168 ABC, CR 03-847 ABC, 2011 WL 333380, at *3 (C.D. Cal. Jan. 31, 2011) (quotations omitted). To the extent Plaintiffs point to excerpts of the Court's orders in *Dean* or *Smyth* which Plaintiffs did not explicitly quote in their opposition, they impermissibly "present evidence for the first time when [it] could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals*, 571 F.3d at 880. Moreover, Plaintiffs do not make a "manifest showing" that the Court failed to consider the language they cite. To the contrary, the Court did consider

that language; Plaintiffs simply disagree with the Court's holding.

Also, the Court's holding on this issue was an alternative basis for its decision. The primary holding was that Plaintiffs' class action claims were time-barred regardless of the grounds on which class certification was denied in the two earlier actions. (*See* ECF No. 43 at 4-5.) Thus, even if Plaintiffs' argument had merit (it does not), it would not provide a basis for the Court to alter or amend the judgment.

**C. Plaintiffs' Citation to *Robbin v. Fluor Corp.***

Plaintiffs take issue with the Court's statement that "Plaintiffs do not address *Robbin* [*v. Fluor Corporation*, 835 F.2d 213 (9th Cir. 1987)]." (ECF No. 43 at 4.) Plaintiffs point out that they did reference *Robbin* at the end of their opposition to China AG's motion, in a section addressing China AG's public policy arguments. (*See* ECF No. 35 at 19:19-20:17.)

However, read in context, the Court's statement highlighted the fact that Plaintiffs did not address *Robbin* in analyzing the Ninth Circuit's application of the two seminal Supreme Court cases addressing tolling in the class action context, *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Company v. Parker*, 462 U.S. 345 (1983). Instead, Plaintiffs skipped over that case, which the Court found to be on point, and cited to the Ninth Circuit's later decision in *Catholic Social Services v. I.N.S.*, 232 F.3d 1139 (9th Cir. 2000). (*See* ECF No. 35 at 12:1215:10.) Further, Plaintiffs' attempt to distinguish *Robbin* near the end of their opposition was part of an argument that the Court

considered and rejected - that Plaintiffs were not attempting to relitigate earlier denials of class certification. (*See id.* at 20:5-17; ECF No. 43 at 5-6.)

Therefore, Plaintiffs have not shown that the Court failed to consider a material fact, and the Court's statement regarding Plaintiffs' opposition is not a basis for altering or amending the judgment.

**D. *Natan v. Citimortgage, Inc.***

Finally, Plaintiffs argue that *Natan v. Citimortgage, Inc.*, CV 14-5779 DSF, 2014 U.S. Dist. LEXIS 143280 (C.D. Cal. Oct. 1, 2014), supports their argument that the statute of limitations was tolled as to their class action claims. However, *Natan* was issued five (5) days before Plaintiffs filed their oppositions on October 6, 2014, and thus does not qualify as "a material difference in . . . law that in the exercise of reasonable diligence could not have been known" to Plaintiffs, or "a change of law occurring after" the Court's decision. *See* C.D. Cal. L.R. 7-18(a), (b).

Additionally, *Natan* addressed the circumstances in which an *individual claim* should be tolled due to the pendency of a class action. It did not address the tolling of subsequent class action claims. *Natan*, 2014 U.S. Dist. LEXIS 143280, at *2-4. Therefore, *Natan* does not support Plaintiffs' argument, and certainly does not warrant altering or amending the judgment.

## IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion.

**IT IS SO ORDERED.**

## APPENDIX D - COURT OF APPEALS DENIAL OF REHEARING

FILED

JUL 03 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| MICHAEL H. RESH, On Behalf of Himself and All Others Similarly Situated; WILLIAM SCHOENKE; HEROCA HOLDING, B.V.; NINELLA BEHEER, B.V.,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>CHINA AGRITECH, INC.; YU CHANG,<br>Company,'s CEO, President, Secretary and<br>, Chairman of the Board; YAU-SING TANG, AKA Gareth Tang, Company's Chief Financial Officer; GENE MICHAEL BEN- | No. 15-55432<br><br>D.C. No. 2:14-cv-05083-RGK-PJW<br>Central District of California, Los Angeles<br><br>ORDER |

NETT, Director of CAGC; XIAO RONG TENG, Director of CAGC; MING FANG ZHU; LUN ZHANG DAI, Director of CAGC; CHARLES LAW, AKA Charles C. Law, AKA Charles Chien-Lee Law, AKA Charles Chien-Lee Loh, AKA Chien-Lee C. Loh, Director of CAGC; ZHENG WANG, Director of CAGC,

Defendants-Appellees.

Before: REINHARDT, W. FLETCHER, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc, filed June 7, 2017.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

RECORD AND BRIEFS

FILED
OCT 23 2017
OFFICE OF THE CLERK

No. 17-432

# In the Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner*,

v.

MICHAEL H. RESH, *et al.*,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF THE QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to *all* asserted members of the class who would have been parties had the suit been permitted to continue as a class action." (Emphasis added). The question presented is:

Whether plaintiffs whose individual claims are timely as a result of *American Pipe* tolling may also bring those claims in a subsequent class action on behalf of all class members whose claims are also timely as a result of *American Pipe* tolling.

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Respondents William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V. (hereinafter "Respondents"), respectfully submit this opposition to the petition for a writ of certiorari filed by China Agritech, Inc. ("China Agritech" or "Petitioner").[1]

## INTRODUCTION

Respondents filed a class action alleging that China Agritech and its managers and directors violated the Securities Exchange Act of 1934 ("Exchange Act"). Respondents were unnamed plaintiffs in two earlier-filed class actions against many of the same defendants based on the same underlying events. The district court denied class certification in both of the prior actions only because of defects specific to the named plaintiffs in those actions. Under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the statute of limitations was tolled during the pendency of both of the earlier actions for Respondents' claims as well as the claims of all asserted members of the class. As the Petitioner conceded and the district court held, there was no time bar preventing Respondents from bringing the present action on an individual basis. Rather, the Petitioner argued that the undoubtedly timely-filed claims could not be pursued as a class action under Rule 23, but could only be pursued in a multiplicity of individual actions. The United States Court of Appeals for the Ninth Circuit

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[1] Michael Resh, one of the plaintiffs in the action, recently passed away. A statement of fact of death was filed in the district court on October 4, 2017. Consequently, Mr. Resh is not included as a Respondent herein.

rejected that argument and ruled that Respondents' class action complaint was timely filed. The Ninth Circuit held that because Respondents' individual claims were tolled under *American Pipe* and *Crown, Cork & Seal* during the pendency of the prior actions (as were the claims of all putative class members), the Respondents were entitled to bring their timely individual claims as named plaintiffs in a would-be class action.

The petition for a writ of certiorari should be denied for three reasons.

First, the Ninth Circuit's decision that timely-filed claims under *American Pipe* may be pursued as a class action presents no conflict among the circuits requiring resolution by this Court. Every Court of Appeals to consider this issue in light of this Court's opinions in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010) and *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), has held that a plaintiff is entitled to assert timely claims on behalf of all asserted members of a class (who also have timely claims) and that denial of certification in an earlier case cannot bar a plaintiff with timely claims from seeking class certification in a later case. The Sixth, Seventh and Ninth Circuits have now held that denying a plaintiff the right to pursue timely claims on behalf of a putative class of all those similarly situated would be inconsistent with: (i) this Court's ruling in *Shady Grove* that Rule 23 permits any plaintiff whose claims meet its criteria to pursue those claims on behalf of a class; and (ii) this Court's ruling in *Smith v. Bayer* that denials of class certification are not binding on absent class members in subsequent cases.

Second, those Courts of Appeals that considered whether plaintiffs with timely claims could also bring those claims in a subsequent class action prior to this Court's *Shady Grove* and *Smith v. Bayer* opinions were each animated by a concern that allowing plaintiffs with timely claims to seek class certification in later cases would lead to the "indefinite" and "endless" relitigation of class certification determinations. Those concerns are without merit based on this Court's decision in *Smith v. Bayer* directing district courts to simply "apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317. Those concerns should be further mitigated if not rendered moot by this Court's recent opinion in *California Public Employees' Retirement System v. ANZ Securities Inc.*, 137 S. Ct. 2042 (2017), whereby the Court held that *American Pipe* tolling cannot apply to override the fixed time limit of the statute of repose in securities class actions.

Third, the opinion below was correctly decided and is fully consistent with the principles underlying both *American Pipe* and *Crown, Cork* and a contrary result would have the illogical and inconsistent consequence of restricting a plaintiff with timely claims from pursuing those claims on behalf of absent class members who also have timely claims.

## STATEMENT OF THE CASE

### A. Factual Background

China Agritech was a holding company incorporated in Delaware with its principal place of business in Beijing, China. The company claimed to manufacture and sell organic compound fertilizers in China. In a

2009 filing with the U.S. Securities and Exchange Commission ("SEC"), China Agritech reported net revenue of $76 million, which was triple the $25 million in revenue it reported for 2005. On February 3, 2011, LM Research, a market research company, published a report entitled "China Agritech: A Scam" (the "LM Report"). The LM Report asserted that China Agritech was "not a currently functioning business that [was] manufacturing products," but instead was "simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." Alleging idle factories, minimal investments, and fictitious contracts, the report concluded that China Agritech had "grossly inflated its revenue, failed to account for tens of millions of investor dollars, and [had] virtually no product in the market." Upon release of the LM Report, China Agritech's shares declined precipitously.

After China Agritech denied the allegations detailed in the LM Report, an investor responded by publishing an article sarcastically titled, "China Agritech: China's amazing productivity levels" (the "BC Article"). The BC Article contended that photos released by China Agritech did not show even the most basic equipment required for operations of the magnitude that China Agritech claimed. China Agritech's stock value declined once again in response to the BC Article.

China Agritech subsequently announced the formation of a Special Committee of its Board of Directors to investigate the serious and mounting allegations of fraud. The next day, China Agritech dismissed its independent auditor, Ernst & Young Hua Ming ("E&Y"), and publicly disclosed that E&Y had

earlier insisted that the board commence an investigation into previously identified accounting irregularities. NASDAQ halted trading in China Agritech stock and initiated delisting proceedings and the SEC subsequently issued an enforcement order revoking the registration of China Agritech stock.

### B. Initial Class Actions

On February 11, 2011, eight days after the LM Report first questioned the veracity of China Agritech's operations and financial reports, Theodore Dean ("Dean") filed a class action complaint against China Agritech and other defendants on behalf of all China Agritech investors. *See Dean v. China Agritech, Inc.*, Case No. 2:11-cv-1331-RGK (C.D. Cal.) (the "*Dean* Action"). Several movants sought appointment as lead plaintiff, but the district court denied each of the motions despite the mandatory appointment of a lead plaintiff pursuant to the Private Securities Litigation Reform Act amendments to the Exchange Act. See 15 U.S.C. § 78u-4. After sustaining the complaint over a motion to dismiss, the district court in the *Dean* Action denied the plaintiffs' motion for class certification. The district court concluded that although the *Dean* Action plaintiffs had satisfied all four requirements of Rule 23(a), they had failed to establish the predominance requirement of Rule 23(b)(3). The failure to establish predominance was a plaintiff-specific failure in an expert report rather than an incurable classwide defect. The *Dean* Action subsequently settled on an individual basis.

On October 4, 2012, three weeks after the *Dean* Action settled, Kevin Smyth (represented by the same counsel as in the *Dean* Action) filed an almost identical

class-action complaint on behalf of the same would-be class against China Agritech. *See Smyth v. Chang*, Case No. 2:13-cv-3008-RGK (C.D. Cal.) (the "*Smyth* Action"). The district court once again declined to follow the requirements of the Exchange Act by failing to appoint a lead plaintiff. After denying the motion to dismiss the *Smyth* Action, the district court denied the plaintiffs' motion for class certification because the *Smyth* Action plaintiffs were individually unable to meet the adequacy and typicality requirements of Rule 23(a). The failure to meet the Rule 23(a) requirements was, once again, plaintiff-specific rather than an incurable classwide defect. Respondent China Agritech also argued that the district court should strike plaintiffs' class allegations in the *Smyth* Action because the district court had already engaged in a rigorous class-certification analysis in the *Dean* Action and, consequently, there was nothing more the plaintiffs could submit to cure the supposedly "fatal" defects in the prior plaintiffs' class allegations. Squarely rejecting this argument, the district court observed that principles of comity did not mandate the denial of class certification in the *Smyth* Action based on the denial of class certification in the *Dean* Action because, *inter alia*, the *Dean* Action class certification denial was based on a plaintiff-specific infirmity. The *Smyth* Action also subsequently settled on an individual basis.

### C. Respondents' Action and District Court Ruling

On June 30, 2014, Michael Resh (represented by different counsel from counsel in the *Dean* and *Smyth* Actions) filed a class action against China Agritech and several individual defendants alleging the same claims

set forth in the *Dean* and *Smyth* Actions (the "*Resh* Action"). The district court once again declined to follow the requirements of the Exchange Act by failing to appoint a lead plaintiff. The Respondents, including Resh, filed an amended complaint shortly thereafter.

Petitioner subsequently moved to dismiss the *Resh* Action in its entirety or, in the alternative, to strike the *Resh* Action's class allegations. The district court granted China Agritech's motion to dismiss the *Resh* Action – in its entirety – as untimely based on it being styled as a class action complaint. Although both the Petitioner and the district court acknowledged that the Respondents' Exchange Act claims were timely as a consequence of *American Pipe* tolling – indeed, the district court *invited* Respondents to file a new individual action alleging the exact same claims so long as the claims were not alleged on behalf of a class under Rule 23 – the district court nevertheless dismissed the action because it believed that the statute of limitations was not tolled for Respondents' would-be class action. In the view of the district court, a contrary ruling "would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence." Pet. App. 9a.

### D. Ninth Circuit Reversal

The Ninth Circuit reversed the district court's order dismissing the *Resh* Action as untimely. The Ninth Circuit began its analysis with this Court's rulings in *American Pipe* and *Crown, Cork*. Noting that the *American Pipe* tolling rule was adopted to "promote economy in litigation" and that absent tolling,

"[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable" (Pet. App. 13a), the Ninth Circuit explained that "once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.*

Under *American Pipe* and *Crown, Cork*, the Ninth Circuit explained that "it is clear that the individual claims of the would-be class members in the *Resh* Action have been tolled during the pendency of earlier class actions." Pet. App. 14a. As a consequence of that tolling, the Respondents were entitled to "bring entirely new individual suits [. . .] either separately *or jointly*." *Id.* (Emphasis added). In fact, the court below explained that its holding was entirely consistent with its earlier ruling in *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (*en banc*). Specifically, Judge Fletcher – writing in the decision below and recounting the *en banc* decision that he had also authored 20 years earlier – reiterated that whether plaintiffs should be permitted to aggregate claims in a subsequent class action is not a statute of limitations question at all, but rather, depends on the operation of preclusion and preclusion-related principles. Pet. App. 15a – 16a.

The Ninth Circuit also explained that its holdings in both *Catholic Services* and the case below were fully consistent with this Court's recent decisions in *Shady Grove* and *Smith v. Bayer*. *Shady Grove*, the court explained, holds that under Rule 23, a plaintiff with a

valid claim may maintain her case as a class action if the terms of the Rule are satisfied; thus, if the individual class representatives' claims were timely as a result of *American Pipe* tolling, their case may proceed as a class action *if* the Rule 23 class action prerequisites are satisfied. In short, *Shady Grove* "rejected an argument [. . .] that only certain categories of claims are eligible for class treatment under Rule 23." Pet. App. 17a. Moreover, any holding that a previous denial of class certification would bar a new class representative with a timely claim from seeking to represent other plaintiffs whose individual claims have the benefit of *American Pipe* tolling would be inconsistent with *Smith v. Bayer*'s holding that decisions rejecting class certification are not binding on class members who are not named plaintiffs.

The Ninth Circuit panel unanimously denied Petitioner's petition for rehearing and for rehearing *en banc*. The full Ninth Circuit was advised of the petition for *en banc* rehearing, and no judge of the court requested a vote on the petition. The petition for a writ of certiorari followed.

## REASONS FOR DENYING THE PETITION

### I. There Is No Conflict Among the Courts of Appeals

#### A. *Shady Grove* and *Smith v. Bayer*

In *Shady Grove*, this Court ruled that plaintiffs who can pursue their claims individually in the federal courts *must* be permitted to pursue their claims together as a class action, as long as they can satisfy the requirements of Rule 23. *Shady Grove*, 559 U.S. at 398. As this Court held, Rule 23 "creates a categorical

rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," and "provides a one-size-fits-all formula for deciding the class-action question." *Id.* at 398-99. In reaching this decision, the Court rejected a New York statute that authorized the award of punitive damages, but only if those invoking the statute refrained from aggregating their claims in the pursuit of a class action. Writing for a Court that was unanimous on this question, Justice Scalia explained that while the state statute may have been prompted by sound policy, it could not impede access to class certification, nor could it override Rule 23's clear text. *Id.* at 403.

In *Smith v. Bayer Corp.*, this Court held that the denial of class certification in one case *does not* preclude members of a failed putative class from pursuing the same claims in a separate class action. In addition, the Court rejected the argument that allowing absent members of a failed class action to pursue their claims in another class proceeding would constitute an abuse of the class action device. Instead, the Court *unanimously* held that the denial of class certification in one case *does not* preclude absent members of the failed putative class from pursuing the same claims in a separate class action. *Smith*, 564 U.S. at 307-08. The Court acknowledged Bayer's argument that "serial relitigation of class certification" could be unfair to defendants, and that defendants could be "forced in effect to buy litigation peace by settling." *Id.* at 316 (internal quotation marks omitted). The Court responded that district courts should simply "apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317.

### B. Unanimous Application of *Shady Grove* and *Smith v. Bayer*

Every Court of Appeals to consider whether *American Pipe* tolling applies to subsequent class actions in the same way as it does to subsequent individual actions within the statute of limitations period in light of *Shady Grove* and *Smith v. Bayer* has answered the question affirmatively.

In *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011), the Seventh Circuit explained that "[t]olling lasts from the day a class claim is asserted until the day the suit is conclusively not a class action—which may be because the judge rules adversely to the plaintiff, or because the plaintiff reads the handwriting on the wall and decides not to throw good money after bad." In *Sawyer*, defendants argued that plaintiffs' class action was barred by the statute of limitations, but the district court denied the motion, holding that the limitations period was tolled during the pendency of a prior class action. The Seventh Circuit affirmed. Writing for a unanimous panel, Judge Easterbrook rejected the view that "Rule 23 must be set aside when a suit's timeliness depends on a tolling rule" as it "cannot be reconciled with the Supreme Court's . . . decision in *Shady Grove Orthopedic Associates*, which holds that Rule 23 applies to *all* federal civil suits, even if that prevents achieving some other objective that a court thinks valuable." *Id.* at 564.

In *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), with respect to tolling, the Sixth Circuit cited and followed the Seventh Circuit's decision in *Sawyer*. *Id.* at 652. Like the Seventh Circuit before it

and the Ninth Circuit after it, the Sixth Circuit held that "subsequent class actions timely filed under *American Pipe* are not barred. Courts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation, but we would eviscerate Rule 23 if we were to approve [a rule that . . .] bars *all* follow-on class actions." *Id.* at 652. With respect to preclusion, the court relied on *Smith v. Bayer*. Wal-Mart, like Bayer, argued that allowing repeated litigation of class action certification questions by different named plaintiffs would force defendants "to settle to buy peace." *Id.* at 653. The court responded that Wal-Mart's concerns "need not bar legitimate class action lawsuits or distort the purposes of *American Pipe* tolling. Instead, we follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns." *Id.*

The Ninth Circuit cited *Sawyer* and *Phipps* and ruled as each of the other Courts of Appeals have done when considering the same question in light of *Shady Grove* and *Smith v. Bayer*: "[w]e conclude that plaintiffs' class action complaint is not time-barred. Plaintiffs' individual claims were tolled under *American Pipe* and *Crown, Cork & Seal* during the pendency of the *Dean* and *Smyth* Actions. So long as they can satisfy the criteria of Rule 23, and can persuade the district court that comity or preclusion principles do not bar their action, they are entitled to bring their timely individual claims as named plaintiffs in a would-be class action." Pet. App. 22a.

No Court of Appeals that has considered this Court's holdings in *Shady Grove* and *Smith v. Bayer* has held that *American Pipe* tolling does not apply to subsequent class actions as it does to individual actions. Consequently, there is no conflict among the Courts of Appeals and this Court need not resolve any circuit split in authority until such time as any Court of Appeals rules differently than the Sixth, Seventh and Ninth Circuits have already done. Even if there were any doubt as to the proper application of *Shady Grove* and *Smith v. Bayer* here, this Court would benefit from allowing the issue to percolate further and obtaining the considered views of other Courts of Appeals on the subject before addressing the issue. Indeed, until *any* federal appellate court has reached a different conclusion, there is no need for this Court to review the Ninth Circuit's decision.[2]

### C. Numerous Courts of Appeals Opinions Predating *Shady Grove* and *Smith v. Bayer* Also Permit Tolling

Several Courts of Appeals that considered the issue before *Shady Grove* and *Smith v. Bayer* also recognized

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[2] In *Odle v. Flores*, 683 F. App'x 288 (5th Cir. 2017), although the Fifth Circuit vacated the district court's order denying intervention and remanded for further proceedings, it observed as follows: "On appeal, the would-be intervenors have argued that the district court previously erred by dismissing the original plaintiffs' class claims as untimely based on its determination that equitable tolling of the statute of limitations under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), is improper in a subsequent class action." *Id.* at 289. The Fifth Circuit declined to answer the question, however, while the would-be intervenors' status is considered by the district court.

tolling for subsequent class actions. For example, in *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004), the Third Circuit held that tolling applied to a subsequent class action where the earlier denial of class certification was based on the lack of an adequate representative. *Id.* at 108. Indeed, the Third Circuit expressly rejected the position that Petitioner advances here: "it would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown." *Id.* at 106. Although the Third Circuit has not considered the issue in light of *Shady Grove* and *Smith v. Bayer*, in *Leyse v. Bank of Am., Nat'l Assoc.*, 538 Fed. App'x 156, 161 (3rd Cir. 2013), the Third Circuit cited the Seventh Circuit's *Sawyer* decision with approval.

In *Catholic Services* (en banc), the Ninth Circuit allowed tolling for a subsequent class action and observed that "this is not a statute of limitations question at all. It is, rather, a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class action to litigate those actions." *Catholic Services*, 232 F.3d at 1147. The Eighth Circuit also recognizes tolling in certain situations: "Whether the *American Pipe* rule applies to subsequent class actions [thus] depends on the reasons for the denial of certification of the predecessor action." *Great Plains Trust Co. v. Union Pac. R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007).

## II. The Decision Below Does Not Permit "Endless Relitigation" of Class Certification Determinations

### A. Principles of Comity and Stare Decisis Prevent Endless Relitigation of Class Certification Determinations

Petitioners assert that "the Ninth Circuit joined the Sixth and Seventh Circuits in adopting a rule that would extend the statute of limitations for class actions *indefinitely*" and "permit *endless relitigation* of class certification determinations." Pet. at 3, 15 (emphasis added). That argument echoes the outdated reasoning of the minority of Courts of Appeals that, in decades-old rulings predating *Shady Grove* and *Smith v. Bayer*, rejected *American Pipe* tolling for subsequent class actions. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (concern that contrary ruling would "allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class"); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (contrary ruling would "afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints"); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) ("[t]he plaintiffs may not 'piggyback one class action onto another' and thereby engage in endless rounds of litigation in the district court and in this Court over the adequacy of successive named plaintiffs to serve as class representatives."); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985) (concern that "putative class

members may piggyback one class action onto another and thus toll the statute of limitations indefinitely").[3]

But the argument that the decision below creates a rule that extends the statute of limitations for class actions indefinitely and permits endless relitigation of class certification determinations is without merit for the straightforward reasons given by the Sixth and Ninth Circuits based on this Court's *Smith v. Bayer* opinion. In short, "ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class action certification." Pet. App. 22a.

Petitioner responds that the Ninth Circuit's reliance on *Smith v. Bayer* and the observation that district courts need only apply comity when facing subsequent class certification motions is faulty because comity is "as vague as it is rare." Pet. at 26. But Petitioner took

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[3] The Eleventh Circuit did not address either *Shady Grove* or *Smith v. Bayer* in *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015), and the plaintiffs in that case did not make the argument. Rather, the court merely considered its earlier opinion in *Griffin* controlling, and observed that an Eleventh Circuit "panel cannot overrule a prior panel's holding." *Id.* at 1328. The issue was fully briefed in light of *Shady Grove* and *Smith* in a subsequent matter before the Eleventh Circuit in *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322 (11th Cir. 2017), but the court dismissed the appeal for lack of jurisdiction and did not reach the question. The district court in that case had observed that "the rationale for the no-piggybacking rule is certainly undermined by the Supreme Court's rulings" in *Smith v. Bayer* and *Shady Grove*. *Love v. Wal-Mart Stores, Inc.*, No. 12-61959-CIV-SCOLA, 2013 U.S. Dist. LEXIS 143234, at *12 (S.D. Fla. Sep. 23, 2013).

this very approach when it argued for denial of the class certification motion in the later-filed *Smyth* Action based on the district court's denial of the class certification motion in the earlier-filed *Dean* Action. Indeed, Petitioner cited this Court's *Smith v. Bayer* decision in support of the argument that the district court should reject the second proposed class action based on principles of comity and stare decisis. The district court considered the argument, and declined to apply comity or stare decisis to its own prior rulings based on the unique facts of the case. "Given the different factual showings in each case, it would be improper to decide class certification issues based solely on comity [. . .] [I]f Rule 23(b) forms an additional barrier to class certification in this case, it is because the evidence Plaintiffs produced is insufficient to meet their burden under Rule 23(b), not because of principles of comity." *Smyth v. China Agritech, Inc.*, No. CV 13-03008-RGK (PJWx), 2013 U.S. Dist. LEXIS 195196, at *21 (C.D. Cal. Sept. 26, 2013). In short, the district court had no difficulty in applying the principles of *Smith v. Bayer* just as this court and numerous Courts of Appeals have directed. The straightforward application of *Smith v. Bayer*'s comity principle to subsequent class certification motions is neither vague nor rare and Petitioner's argument to the contrary should be rejected.

Indeed, numerous district courts after *Smith v. Bayer* have applied this principle, giving persuasive, though not dispositive, weight to decisions denying certification of identical or very similar classes. *See, e.g., Ott v. Mortgage Inv. Corp.*, 65 F. Supp. 3d 1046 (D. Or. 2014); *Murray v. Sears, Roebuck & Co.*, No. C09-5744CW, 2014 U.S. Dist. LEXIS 18082 (N.D. Cal. Feb.

12, 2014); *Williams v. Winco Foods*, No. CV13-00146 CRB, 2013 U.S. Dist. LEXIS 108928 (N.D. Cal. Aug. 1, 2013). And because it is unlikely that federal courts will disregard a decision denying certification of an identical class, the fear that plaintiffs will waste time and money repeatedly attempting to certify the same uncertifiable class is unjustified. As one court observed, the application of comity principles to reject a second attempt to certify a class "aptly illustrates why future copycat suits would be ill-advised." *Williams*, 2013 U.S. Dist. LEXIS 108928, at *7. "Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008).

### B. This Court's *ANZ Securities* Decision Likely Also Forecloses Endless Relitigation of Class Certification Determinations

Petitioners would also likely argue that if the district court later denies class certification in this case that any subsequent action would be untimely based on this Court's recent opinion in *California Public Employees' Retirement System v. ANZ Securities Inc.*, 137 S. Ct. 2042 (2017). In *ANZ Securities*, this Court considered an investor class action alleging that various defendants violated the Securities Act by making misstatements or omissions in public securities offerings issued by Lehman Brothers prior to the company's well-publicized implosion. California Public Employees' Retirement System ("CalPERS"), which had purchased the securities at issue, was a member of the class action and also subsequently filed its own

individual suit more than three years after the securities had been offered. After the parties to the class action reached a classwide settlement, CalPERS opted out of the class action and sought to proceed with its own individual action. In response, the defendants moved to dismiss CalPERS' suit as untimely in light of the Securities Act's three year statute of repose.

This Court held that the filing of a putative class action alleging violations of the Securities Act of 1933 *does not* toll the statute of repose for an individual plaintiff's claims. The Court affirmed that the Securities Act's three-year statute of repose is *not* subject to *American Pipe* tolling during the pendency of a class action. This Court based its holding on the plain text of the Securities Act itself: "In *no event* shall any action be brought to enforce a liability created under [Section 11] more than three years after the security was offered to the public." *Id.* at 2047 (emphasis added). As a consequence of that plain language, CalPERS' filing of a new complaint more than three years after the relevant securities offering was untimely.

In *ANZ Securities*, this Court contrasted statutes of limitations (which encourage plaintiffs to pursue diligent prosecution of known claims) with statutes of repose (which "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Id.* at 2049) (internal quotations marks omitted). In this way, the statute of repose reflects a legislative mandate to "give a defendant a complete defense to any suit after a certain period." *Id.* Equitable, judge-made tolling rules, like the one announced in *American Pipe*, cannot

apply to override "fixed limit[s]" set by Congress in statutes of repose — which, like Section 13, reflect a "'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" *Id.* at 2051 (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014)). Accordingly, applying *American Pipe* to "permit[] a class action to splinter into individual suits" after expiry of the three-year repose period would controvert the intent behind Section 13. *Id.* at 2053.

*ANZ Securities* likely renders Petitioner's assertion that the Ninth Circuit's opinion permits endless tolling in Exchange Act cases incorrect as a matter of law. Indeed, the facts of this case illustrate the point. Under the Exchange Act, "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). As set forth above, in February 2011, the LM Report first asserted that China Agritech was "not a currently functioning business that [was] manufacturing products," but instead was "simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." Under the Exchange Act's five year statute of repose, no action could be timely filed under the statute of repose after February 2016 (at the latest). And under this Court's *ANZ Securities* decision, Petitioner would likely argue the statute of limitations cannot be tolled past the statute of repose

and, consequently, any relitigation of class certification determination can only extend as long as the statute of repose. Petitioners would, consequently, argue that any action filed after the district court makes a determination on class certification in this case would be untimely and subject to dismissal under *ANZ Securities* and the Exchange Act's five-year statue of repose. Indeed, the Third Circuit has already applied *ANZ Securities* to the Exchange Act's five-year statute of repose. *See North Sound Capital LLC v. Merck & Co.*, No. 16-1364, 2017 U.S. App. LEXIS 14170 (3d Cir. Aug. 2, 2017).

## III. The Decision Below Is Correct and Fully Consistent with *American Pipe* and *Crown Cork*

The Ninth Circuit's opinion – like those of the Sixth and Seventh Circuits before it – is fully consistent with the rationale set forth in both *American Pipe* and *Crown, Cork*. Allowing a subsequent class action creates no unfair surprise to defendants because the pendency of a prior class suit has already alerted them "not only [to] the substantive claims being brought against them, but also [to] the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. Allowing a subsequent action to proceed as a class action, rather than only as an individual action, also promotes economy of litigation by reducing incentives for filing duplicative, protective class actions because "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." *Crown, Cork & Seal*, 462

U.S. at 350–51. If each unnamed member of a class that is not certified due to a plaintiff-specific defect were barred from ever again proceeding by class action, each class member would have an incentive to multiply litigation by filing protective suits or motions to intervene at the outset of the initial class action suit. The weight of individual filings would strain the federal courts. This is precisely the scenario that "Rule 23 was designed to avoid" in cases where adjudication of claims by class action is a fair and efficient method of resolving a dispute. *American Pipe*, 414 U.S. at 551, 553–54; *Wyser-Pratte Mgt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005) ("The purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided.")

Here, it is uncontested that *every* putative class member has a timely claim as a consequence of *American Pipe* tolling. It is also uncontested that Respondents' action was timely filed as a consequence of *American Pipe* tolling. The *only* question is whether Respondents' timely claims may be pursued as a class action using the civil procedures set forth in Rule 23. Petitioner would use the statute of limitations as a backdoor means of *denying* litigants with undoubtedly timely claims the ability to use the class action device provided by Rule 23 to pursue timely claims on behalf of all others similarly situated. But that outcome would have the incompatible result of making a plaintiff's and absent class members' substantive rights differ depending on whether they were pursued in a class action or an individual action: a plaintiff in an individual action would have a timely claim, while the

same plaintiff could not assert the same timely claim in a class action. But that would conflict with "the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting). A class action thus "leaves the parties' legal rights and duties intact and the rules of decision unchanged"; it can "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights," but "alter only how the claims are processed." *Shady Grove*, 559 U.S. at 408 (plurality opinion). Just as a plaintiff cannot acquire substantive rights that she would not have individually by becoming a member of a class, she cannot lose substantive rights, either. Indeed, if plaintiffs had fewer or lesser substantive claims in a class action than an individual action, Rule 23 would conflict with the Rules Enabling Act's prohibition on rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a); *Shady Grove*, 559 U.S. at 406–09 (plurality opinion); *id.* at 422–25 (Stevens, J., concurring); *id.* at 438 (Ginsburg, J., dissenting).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: October 23, 2017

Respectfully Submitted,

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RECORD AND BRIEFS

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No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner*,

v.

MICHAEL H. RESH, *et al.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

The opposition to certiorari only confirms the case for this Court's review.

Respondents do not dispute that the courts of appeals have divided over whether the equitable tolling doctrine announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), applies to subsequent class as opposed to individual actions. Instead, they argue that courts that have previously rejected *American Pipe* tolling for class actions will jettison that rule and adopt the Ninth Circuit's holding below in light of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), and *Smith v. Bayer Corp.*, 564 U.S. 299 (2011). But if anything, those cases *confirm* that *American Pipe* applies only to individual actions. And in any event, there is no reason to speculate—at least two courts of appeals have recently reaffirmed their long-held position rejecting *American Pipe* tolling for class actions.

This decisional conflict requires this Court's resolution. The question presented is important and recurring, and the continued existence of the circuit conflict will lead to obvious and unwarranted forum-shopping opportunities. This case presents an ideal vehicle through which to resolve the conflict. And the decision below is incorrect.

The petition should be granted.

### A. The Courts of Appeal Are Divided on the Question Presented

There is a three-way circuit conflict over whether *American Pipe* tolling allows a formerly-absent class

member to bring a new class action beyond the limitations period. The First, Second, Fifth, and Eleventh Circuits categorically reject *American Pipe* tolling for subsequent class actions. Pet. 11–14. The Third and Eighth Circuits reject *American Pipe* tolling when (as here[1]) class certification was denied based on the unsuitability of the suit for class treatment, but allow tolling when the amenability of the suit for class treatment has not yet been determined. Pet. 14–15. And the Sixth, Seventh, and now Ninth Circuits allow *American Pipe* tolling for class actions without exception. Pet. 15–18.

Respondents do not dispute that the courts of appeals disagree over the question presented. Rather, their principal contention is that the courts that have rejected *American Pipe* tolling for class actions will reconsider that rule in light of this Court's decisions in *Shady Grove* and *Smith*. *See* Opp. 9–13. Respondents are mistaken. *Smith reaffirms* that *American Pipe* tolling applies to "a putative member of an uncertified class [to] wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*." 564 U.S. at 313 n.10 (emphasis added). And as the petition explained, and as explained further below, *Shady Grove* has nothing to do with tolling or any other issue relevant to this case. *See* Pet. 29-30; *infra* at 11.

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[1] Respondents repeatedly contend that the district court denied class certification in both the *Dean* and *Smyth* actions "because of defects specific to the named plaintiffs in those actions." Opp. 1. But the *Dean* class "failed to establish the predominance requirement of Rule 23(b)(3)," Pet. App. 6a—a defect in the class, not the plaintiff.

In support of their assertion that courts of appeals that have refused to extend *American Pipe* to class actions will reverse themselves in light of *Shady Grove* and *Smith*, respondents cite the Sixth, Seventh, and Ninth Circuit decisions that have applied *American Pipe* tolling to class actions after *Shady Grove* and *Smith*. Opp. 11–13 (citing *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), and Pet. App. 1a–23a). But none of those courts *reversed* prior precedent rejecting *American Pipe* tolling for class actions. In fact, *no* court has changed its view about whether *American Pipe* tolling applies to class actions in light of *Shady Grove* and *Smith*. To the contrary, two courts of appeals have expressly *reaffirmed* their rules after *Shady Grove* and *Smith*, and another one considered for the first time and rejected *American Pipe* tolling for class actions after those decisions came down.

The Eleventh Circuit has twice reaffirmed its rule since *Shady Grove* and *Smith*. In *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015), the court reaffirmed its prior decision in *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994), concluding that *American Pipe* tolling is inapplicable to class actions. *See* 795 F.3d at 1328. Respondents bury *Ewing* in a footnote, contending that it is irrelevant because plaintiffs there did not rely on this Court's intervening decisions. Opp. 16 n.3. Wrong. The *Ewing* plaintiffs expressly argued that *Griffin* "'cannot be reconciled with the Supreme Court's later decision in *Shady Grove*,'" Brief for Plaintiffs-Appellants, 2014 WL 5299297, at *23-24 (11th Cir. Oct. 8,

2014) (quoting *Sawyer*, 642 F.3d at 564), yet the Eleventh Circuit rejected that argument, *Ewing*, 795 F.3d at 1328. The *Ewing* plaintiffs then petitioned for rehearing en banc, arguing that the Eleventh Circuit should reconsider its rule in light of *Sawyer* and *Phipps* (which themselves incorrectly rely on this Court's recent precedents), Pet. for Reh'g En Banc, No. 14-13842, at 2 (11th Cir. Aug. 21, 2015), but the Eleventh Circuit denied rehearing. Unsurprisingly, that court again held several months ago that "[i]n the Eleventh Circuit ... [*American Pipe*] tolling is limited to individual, not class, claims." *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1323 (11th Cir. 2017).

The Third Circuit has also adhered, after *Shady Grove* and *Smith*, to its position that *American Pipe* tolling does not apply to class actions so long as the validity of the class has been adjudicated. *See In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 409 n.27 (3d Cir. 2015) ("[T]he filing of a class action lawsuit in federal court tolls the statute of limitation for the claims of unnamed class members until class certification is denied ... at which point the class member may intervene or file an individual suit."). Respondents do not mention *Community Bank* but argue that a different Third Circuit case, *Leyse v. Bank of America*, 538 F. App'x 156 (3d Cir. 2013), "cited the Seventh Circuit's *Sawyer* decision with approval." Opp. 14. *Leyse* was about whether *American Pipe* tolls the limitations period *for an individual action* during the pendency of a class action that was never presented for certification, 538 F. App'x at 160, and the court cited *Sawyer* for the proposition that it does, *id.* at 161–62. In other words, *Leyse* had nothing to do with—and cited *Sawyer* for a

proposition having nothing to do with—the question presented here.

Finally, the Fourth Circuit held after *Shady Grove* and *Smith* that "*American Pipe/Crown, Cork & Seal* tolling applies when a class action is commenced by the filing of a complaint and tolls an *individual's* statute of limitations, not the statute of limitations for the proposed class." *Angles v. Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 (4th Cir. 2012). That opinion is unpublished, but it shows that even appellate courts addressing the issue for the first time are not compelled to extend *American Pipe* to class actions after *Shady Grove* and *Smith*.[2]

In short, there is an ongoing, intractable circuit conflict over whether *American Pipe* tolling extends to class actions. Only this Court can resolve the conflict. The petition should be granted.

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[2] District courts in circuits that have in the past rejected *American Pipe* tolling for subsequent class actions continue to apply that rule after *Shady Grove* and *Smith*. *See, e.g.*, *Carden v. Town of Harpersville*, 2017 WL 4180858, at *12 (N.D. Ala. Sept. 21, 2017); *Krise v. SEI/Aaron's, Inc.*, 2017 WL 3608189, at *7 (N.D. Ga. Aug. 22, 2017); *Barkley v. Pizza Hut of Am., Inc.*, 2015 WL 5008468, at *2 (M.D. Fla. Aug. 21, 2015); *Reaves v. Cable One, Inc.*, 2015 WL 12747944, at *4 (N.D. Ala. Mar. 16, 2015); *Cleary v. Am. Capital, Ltd.*, 2014 WL 793984, at *3 (D. Mass. Feb. 28, 2014); *Forde v. Waterman S.S. Corp.*, 2013 WL 5309453, at *5 (S.D.N.Y. Sept. 18, 2013).

### B. The Question Presented Is Recurring and Important, and This Case Is an Ideal Vehicle for Resolving It

1. a. Respondents do not dispute that the question presented is oft-recurring. Pet. 19. Nor do they seriously contest that the applicability of statutes of limitations to class actions is an important issue, or that the need to ensure national uniformity is especially crucial in the context of nationwide class actions like this one, where forum shopping opportunities are readily available. Pet. 19–20.

b. Instead, Respondents suggest (Opp. 18–21) that the effect of the decision below will be mitigated by *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), which held that *American Pipe* does not apply even to individual actions when the relevant time bar is a statute of *repose* rather than a statute of *limitations*. In *ANZ*, the Court reaffirmed that *American Pipe* is a form of *equitable* tolling and reasoned that because statutes of repose cannot be equitably tolled, *American Pipe* is inapplicable. *Id.* at 2052–54. But statutes of repose are a "relatively rare" form of time bar, *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 397 (2d Cir. 2016)—most statutory time limits, such as the antitrust and civil-rights time bars at issue in *American Pipe* and *Crown, Cork*, are statutes of limitations subject to equitable tolling (and thus, when appropriate, to *American Pipe*). The answer to the question presented here therefore will determine the circumstances under which most time limits in the U.S. Code can be equitably tolled in the class action context—a self-evidently important question.

Moreover, *ANZ* is a weak safeguard against re-litigation in any event, as this case demonstrates. Respondents correctly note (Opp. 20) that 28 U.S.C. § 1658(b) contains not only a 2-year statute of limitations but also a 5-year statute of repose that ran in 2016. But despite the existence of that non-tollable repose provision, respondents here seek to press a *third* identical class action, and class counsel would have been able to add several more had this case not been on appeal for three years—all beyond the 2-year limitations period.

c. Respondents also suggest that the question presented is unimportant because the negative consequences of the Ninth Circuit's rule—including the serial re-litigation of class certification—are mitigated by principles of comity and *stare decisis*. Opp. 15–18. Even were this true, it would not be a reason to deny review. After all, the Court granted certiorari in *Smith* to resolve the effect of preclusion on absent class members of an uncertified class even though the adverse consequences of a rule rejecting preclusion could be "mitigate[d]" by "principles of *stare decisis* and comity." 564 U.S. at 317. The question here is not whether some other doctrine might in some circumstances preclude serial re-litigation of class actions—the question is whether statutory time bars Congress enacted for precisely that purpose will be given effect.

That question is crucially important. Statutes of limitations are "vital to the welfare of society," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and integral to the "evenhanded administration of the law," *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam) (internal quotation marks omitted).

These time limits sometimes yield to equity, but equitable tolling rules "are very limited in character, and are to be admitted with great caution." *Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (internal quotation marks omitted). Ignoring statutes of limitations and instead applying nebulous, discretionary doctrines like "comity" is the opposite of the "evenhanded administration of the law," *Baldwin Cty.*, 466 U.S. at 152—it allows precisely the type of unfettered discretion that statutes of limitations are enacted to preclude.

In any event, neither comity nor *stare decisis* is likely to impose any real limit on stacked class actions. Comity is a "weak" bulwark against re-litigation, requiring only that a court "pay respectful attention to the decision of another judge in a materially identical case, but not more than that even if it is a judge of the same court or a judge of a different court within the same judiciary." *Smentek v. Dart*, 683 F.3d 373, 377 (7th Cir. 2012). And *stare decisis* is even worse. That doctrine applies to compel lower courts to "strictly follow the decisions handed down by higher courts," *Black's Law Dictionary* 1626 (10th ed. 2014), meaning it cannot bar re-litigation unless an appellate court has already weighed in. Even then, it only applies to lower courts within the "same jurisdiction." *Id.* Resort to *stare decisis* thus perversely incentivizes class counsel to decline to appeal adverse certification decisions and instead try their hand in other districts and circuits—a particularly egregious form of class-action forum shopping. Pet. 20.

This case demonstrates the point. After Judge Klausner (the district judge below) denied class certification in the *Dean* action on predominance grounds,

a different plaintiff (Smyth) attempted to forum shop by filing "an almost identical class-action complaint on behalf of the same would be class against China Agritech in federal District Court for the District of Delaware." Pet. App. 7a. The Delaware court transferred the case back to the district court below under 28 U.S.C. § 1404(a), but when the case was reassigned to Judge Klausner, he *rejected* petitioner's argument that the case should be dismissed as a matter of comity, *see* Opp. 17. This history confirms that comity and *stare decisis* simply do not preclude re-litigation of class certification, and certainly do not impose strict, across-the-board time limits of the sort Congress envisions in adopting statutes of limitations.

2. This case is also an ideal vehicle through which to resolve the question presented. Pet. 20. Respondents do not dispute that absent *American Pipe* tolling, their class action would be time-barred, so the question presented is outcome-determinative. *Id.* They do argue that under *ANZ*, a different, currently absent class member will not likely be allowed to bring a *fourth* "identical class-action complaint on behalf of the same would-be class," Pet. App. 7a, because of the 5-year statute of repose in § 1658(b). Opp. 20–21. That is true, but whether *this* class action is timely turns entirely on the answer to the question presented, rendering this petition the perfect vehicle for resolving it.

### C. The Decision Below Is Incorrect

Respondents also defend the decision below on the merits. Opp. 21–23. Even if respondents were right, that would be no basis to deny certiorari. In any event, respondents' defense of the decision below fails.

*American Pipe* is a doctrine of "equitable tolling," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990), which applies only where the plaintiff has exercised "diligence" to protect her rights and some obstacle prevented timely filing, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016). *American Pipe* held that this standard is satisfied for only absent class members who first rely on the class mechanism and then take action to assert their rights. Pet. 23–24. Here, the only claims that are tolled under *American Pipe* are those belonging to the named plaintiffs, i.e., the only previously-absent class members who have now come to court. But applying *American Pipe* to *class* actions means tolling the statute of limitations not just for formerly-absent members who take action to enforce their own rights, but also for absent class members *who continue to remain absent* and thus have not exercised the diligence equity requires. Pet. 24–27; *see also American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (*American Pipe* "must not be regarded" as a way to "save members of the purported class who have slept on their rights"). Because there are no absent class members with timely claims, there can be no certification of a class and thus no class action.

Respondents' contrary position is based entirely on their premise that "*every* putative class member has a timely claim as a consequence of *American Pipe* tolling." Opp. 22. According to respondents, because *American Pipe* tolls the limitations period for all individual class members' claims, and because *Shady Grove* holds that individual claims can be aggregated so long as Rule 23's preconditions are satisfied, respondents *must* be allowed to maintain a class action

so long as Rule 23's other requirements are met. Opp. 22–23. The problem for respondents, of course, is that *American Pipe* does *not* toll the limitations period for every class member: Class members *who seek to assert their rights* (like the named plaintiffs here) can seek the benefit of equitable tolling, but neither *American Pipe* nor any other plausible principle of equitable tolling would apply to absent class members who continue to sleep on their rights. The petition explains this point at length, *see* Pet. 24–28, yet respondents do not even attempt a response.

Respondents' remaining arguments are equally unpersuasive. They argue that the decision below is consistent with *American Pipe* because there is "no unfair surprise" to petitioner in being faced with yet another class action. Opp. 21. The absence of unfair surprise, however, is not a sufficient condition for tolling, but rather a policy rationale that supports tolling where its elements are *otherwise satisfied*. *See Menominee*, 136 S. Ct. at 757 n.5 ("[A]bsence of prejudice ... is not an independent basis for invoking [tolling]." (internal quotation marks omitted)). Respondents also contend that the Ninth Circuits' rule is needed to prevent "duplicative, protective class actions," Opp. 21, but as the petition explained, the U.S. Code and Federal Rules already provide established procedures for managing the existence of multiple class plaintiffs and class actions. *See* Pet. 24–25. There is no basis for ignoring statutorily prescribed time limitations to solve a problem that does not exist.

The decision below is wrong. This Court should grant review and reverse.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner*,
v.
MICHAEL RESH, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## JOINT APPENDIX


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# APPENDIX A

## Relevant District Court Docket Entries

## UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

### Relevant Docket Entries

*Resh v. China Agritech, Inc.*,
Case No. 2:14-cv-05083-RGK-PJW

| Date Filed | # | Docket Text |
|---|---|---|
| 06/30/2014 | 1 | COMPLAINT Receipt No: 0973-14047134 - Fee: $400, filed by plaintiff MICHAEL H. RESH. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Attorney Betsy C Manifold added to party MICHAEL H. RESH(pty:pla))(Manifold, Betsy) (Entered: 06/30/2014) |
| 06/30/2014 | 2 | Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by plaintiff MICHAEL H. RESH. (Manifold, Betsy) (Entered: 06/30/2014) |
| 06/30/2014 | 3 | NOTICE of Related Case(s) filed by plaintiff MICHAEL H. RESH. *and Notice of Pendency of Other Actions or Pro-* |

| Date Filed | # | Docket Text |
|---|---|---|
| | | *ceedings* Related Case(s): 11-1331, 13-3008 (Manifold, Betsy) (Entered: 06/30/2014) |
| 06/30/2014 | 4 | CIVIL COVER SHEET filed by Plaintiff MICHAEL H. RESH. (Manifold, Betsy) (Entered: 06/30/2014) |
| 07/01/2014 | 5 | NOTICE OF ASSIGNMENT to District Judge Audrey B. Collins and Magistrate Judge Ralph Zarefsky. (ghap) (Entered: 07/01/2014) |
| 07/01/2014 | 6 | NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (ghap) (Entered: 07/01/2014) |
| 07/01/2014 | 7 | NOTICE OF DEFICIENCIES in Attorney Case Opening RE: Complaint (Attorney Civil Case Opening) 1. The following error(s) was found: No Notice of Interested Parties has been filed. A Notice of Interested Parties must be filed with every partys first appearance. See Local Rule 7.1-1. Counsel must file a Notice of Interested Parties immediately. Failure to do so may be addressed by judicial action, |

| Date Filed | # | Docket Text |
|---|---|---|
| | | including sanctions. See Local Rule 83-7. (ghap) (Entered: 07/01/2014) |
| 07/01/2014 | 8 | NOTICE OF DEFICIENCIES in Request to Issue Summons RE: Summons Request 2. The following error(s) was found: The caption of the summons must match the caption of the complaint verbatim. If the caption is too large to fit in the space provided, enter the name of the first party and then write see attached.Next, attach a face page of the complaint or a second page addendum to the Summons. The summons cannot be issued until this defect has been corrected. Please correct the defect and re-file your request. (ghap) (Entered: 07/01/2014) |
| 07/01/2014 | 9 | NOTICE OF FILING FEE DUE on Pro Hac Vice Application mailed to attorney Bruce G Murphy for Plaintiff Michael H. Resh. Pro Hac Vice application has not been received by the court. Please return your completed Appli- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | cation of Non-Resident Attorney to Appear in a Specific Case, form G-64, or a copy of the Notice of Electronic Filing of your application and the $325.00 fee and this notice immediately. Out-of-state federal government attorneys who are not employed by the U.S. Department of Justice are required to file a Pro Hac Vice application;no filing fee is required. You have been removed as counsel of record from this case for failure to submit this filing fee. (ghap) (Entered: 07/01/2014) |
| 07/01/2014 | 10 | NOTICE of Interested Parties filed by plaintiff Michael H. Resh, (Manifold, Betsy) (Entered: 07/01/2014) |
| 07/01/2014 | 11 | Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by plaintiff Michael H. Resh. (Manifold, Betsy) (Entered: 07/01/2014) |
| 07/03/2014 | 12 | CIVIL CASE MANAGEMENT ORDER upon filing of the complaint by Judge Audrey B. Collins. (cb) (En- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | tered: 07/03/2014) |
| 07/07/2014 | 13 | 21 DAY Summons Issued re Complaint 1 as to Defendants Gene Michael Bennett, Yu Chang, China Agritech, Inc., Lun Zhang Dai, Does, Charles Law, Yau-Sing Tang, Xiao Rong Teng, Zheng Wang, Hai Lin Zhang, Ming Fang Zhu. (bm) (Entered: 07/07/2014) |
| 07/16/2014 | 14 | NOTICE TO ALL PARTIES AND ORDER. This matter has been transferred to the calendar of the Honorable R. Gary Klausner, United States District Judge. The parties are hereby notified that the reference to the ADR Program is VACATED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (sw) TEXT ONLY ENTRY (Entered: 07/16/2014) |
| 07/16/2014 | 15 | ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 14-03-Related Case-filed. Related Case No: CV 11-01331 RGK(PJWx). Case transferred from Judge Audrey B. Collins and Magis- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | trate Judge Ralph Zarefsky to Judge R. Gary Klausner and Magistrate Judge Patrick J. Walsh for all further proceedings. The case number will now reflect the initials of the transferee Judge CV 14-05083 RGK(PJWx). Signed by Judge R. Gary Klausner (rn) (Entered: 07/16/2014) |
| 07/22/2014 | 16 | STANDING ORDER REGARDING NEWLY ASSIGNED CASES by Judge R. Gary Klausner. (sw) (Entered: 07/22/2014) |
| 07/28/2014 | 17 | PROOF OF SERVICE Executed by Plaintiff Michael H. Resh, upon Defendant Charles Law served on 7/17/2014, answer due 8/7/2014. Service of the Summons and Complaint were executed upon Charles Law, Individual in compliance with Federal Rules of Civil Procedure by personal service. Original Summons NOT returned. (Manifold, Betsy) (Entered: 07/28/2014) |
| 07/30/2014 | 18 | PROOF OF SERVICE Executed by Plaintiff Michael H. |

| Date Filed | # | Docket Text |
|---|---|---|
| | | Resh, upon Defendant China Agritech, Inc. served on 7/18/2014, answer due 8/8/2014. Service of the Summons and Complaint were executed upon SUE RHEA, MANAGING AGENT FOR SERVICE OF PROCESS FOR CHINA AGRITECH, INC. in compliance with Federal Rules of Civil Procedure by service on a domestic corporation, unincorporated association, or public entity. Original Summons NOT returned. (Manifold, Betsy) (Entered: 07/30/2014) |
| 08/05/2014 | 19 | Joint STIPULATION Extending Time to Answer the complaint as to China Agritech, Inc. answer now due 9/5/2014, re Complaint (Attorney Civil Case Opening) 1 filed by defendant China Agritech, Inc..(Attorney Seth A Aronson added to party China Agritech, Inc.(pty:dft))(Aronson, Seth) (Entered: 08/05/2014) |
| 08/05/2014 | 20 | CORPORATE DISCLOSURE |

| Date Filed | # | Docket Text |
|---|---|---|
| | | STATEMENT filed by Defendant China Agritech, Inc. (Aronson, Seth) (Entered: 08/05/2014) |
| 08/05/2014 | 21 | NOTICE of Interested Parties filed by defendant China Agritech, Inc., identifying Federal Insurance Company, Antares, XL Insurance Company Ltd., China PingAn Insurance (Hong Kong) Co., Ltd., PICC Property and Casualty Company Limited, Zurich Insurance Company, and Liberty International Underwriters. (Aronson, Seth) (Entered: 08/05/2014) |
| 09/03/2014 | 22 | NOTICE OF MOTION AND MOTION for Order for Appointment as Lead Plaintiff and Approval of Selection of Counsel; *Memorandum of Points and Authorities In Support Thereof* filed by movant CAGC Investor Group. Motion set for hearing on 10/6/2014 at 09:30 AM before Judge R. Gary Klausner. (Attachments: # 1 Proposed Order)(Attorney Betsy C Manifold added to party CAGC In- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | vestor Group(pty:bkmov)) (Manifold, Betsy) (Entered: 09/03/2014) |
| 09/03/2014 | 23 | DECLARATION of Betsy C. Manifold in support of MOTION for Order for Appointment as Lead Plaintiff and Approval of Selection of Counsel *; Memorandum of Points and Authorities In Support Thereof* 22 filed by Movant CAGC Investor Group. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Manifold, Betsy) (Entered: 09/03/2014) |
| 09/04/2014 | 24 | First AMENDED COMPLAINT against Defendants All Defendants amending Complaint (Attorney Civil Case Opening) 1, filed by PLAINTIFF Michael H. Resh (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Manifold, Betsy) (Entered: 09/04/2014) |
| 09/04/2014 | 25 | NOTICE OF INTERESTED PARTIES filed by PLAINTIFF CAGC Investor Group. (Manifold, Betsy) (Entered: |

| Date Filed | # | Docket Text |
|---|---|---|
| | | 09/04/2014) |
| 09/22/2014 | 26 | *Certification and* NOTICE of Interested Parties filed by Defendant Charles Law, identifying Michael H. Resh, William Schoenke, Heroca Holding BV, Ninella Beheer BV, China Agritech, Inc.. (Attorney Cary J Economou added to party Charles Law(pty:dft))(Economou, Cary) (Entered: 09/22/2014) |
| 09/22/2014 | 27 | NOTICE OF MOTION AND MOTION to Dismiss Defendant Charles Law filed by Defendant Charles Law. Motion set for hearing on 11/10/2014 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Memorandum of Points and Authorities In Support of Motion to Dismiss, # 2 Declaration of M. Taylor Florence In Support of Motion to Dismiss, # 3 Exhibit A to the Declaration of M. Taylor Florence In Support of Motion to Dismiss, # 4 Exhibit B to the Declaration of M. Taylor Florence In Support of Motion to Dismiss, # 5 Exhib- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | it C to the Declaration of M. Taylor Florence In Support of Motion to Dismiss, # 6 Request for Judicial Notice In Support of Motion to Dismiss) (Economou, Cary) (Entered: 09/22/2014) |
| 09/22/2014 | 28 | NOTICE OF MOTION AND MOTION to Dismiss The Resh Plaintiffs' Putative Class Action or, In the Alternative, Class Allegations As Barred By Statute of Limitations filed by Defendant China Agritech, Inc.. Motion set for hearing on 11/10/2014 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Declaration of Seth Aronson in support, # 3 Exhibit 1-14 of Aronson Declaration, # 4 Exhibit 15-28 of Aronson Declaration, # 5 Proposed Order)(Aronson, Seth) (Entered: 09/22/2014) |
| 09/22/2014 | 29 | REQUEST FOR JUDICIAL NOTICE re MOTION to Dismiss The Resh Plaintiffs' Putative Class Action or, In |

| Date Filed | # | Docket Text |
|---|---|---|
| | | the Alternative, Class Allegations As Barred By Statute of Limitations 28 filed by Defendant China Agritech, Inc.. (Aronson, Seth) (Entered: 09/22/2014) |
| 09/23/2014 | 30 | SCHEDULING NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. The Motion to Dismiss The Resh Plaintiffs' Putative Class Action or, In the Alternative, Class Allegations As Barred By Statute of Limitations 28, and Motion to Dismiss Defendant Charles Law 27, previously scheduled for 11/10/2014 at 9:00 am have been ADVANCED to 10/27/2014 at 9:00 am. IT IS SO ORDERED.THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (sw) TEXT ONLY ENTRY (Entered: 09/23/2014) |
| 09/24/2014 | 31 | STIPULATION for Order TO EXTEND BRIEFING SCHEDULE DUE TO RELIGIOUS HOLIDAYS filed by Defendant China Agritech, Inc.. (Attachments: # 1 Pro- |

| Date Filed | # | Docket Text |
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| | | posed Order)(Aronson, Seth) (Entered: 09/24/2014) |
| 09/25/2014 | 32 | NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: MOTION to Dismiss Defendant Charles Law 27. The following error(s) was found: Proposed Document was not submitted as a separate attachment. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (shb) (Entered: 09/25/2014) |
| 09/25/2014 | 33 | ORDER TO EXTEND BRIEFING SCHEDULE DUE TO RELIGIOUS HOLIDAYS by Judge R. Gary Klausner. To alleviate the hardship this schedule creates for the Parties and their counsel, this Court will extend the hearing date for Defendants' Motions to Dismiss |

| Date Filed | # | Docket Text |
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| | | until November 3, 2014. Plaintiffs shall file their Oppositions on October 6, 2014, and Defendants shall file their Replies on October 20, 2014. 31 (pso) (Entered: 09/25/2014) |
| 10/01/2014 | 34 | SCHEDULING NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. Movant CAGC Investor Group's Motion for Order for Appointment as Lead Plaintiff and Approval of Selection of Counsel 22, noticed for hearing on October 6, 2014, has been taken under submission and off the motion calendar. No appearances by counsel are necessary. The Court will issue a ruling after full consideration of properly submitted pleadings. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (sw) TEXT ONLY ENTRY (Entered: 10/01/2014) |
| 10/06/2014 | 35 | MEMORANDUM in Opposition to MOTION to Dismiss The Resh Plaintiffs' Putative |

| Date Filed | # | Docket Text |
|---|---|---|
| | | Class Action or, In the Alternative, Class Allegations As Barred By Statute of Limitations 28 filed by Plaintiff Michael H. Resh. (Attachments: # 1 Proposed Order)(Manifold, Betsy) (Entered: 10/06/2014) |
| 10/06/2014 | 36 | MEMORANDUM in Opposition to MOTION to Dismiss Defendant Charles Law 27 filed by Plaintiff Michael H. Resh. (Attachments: # 1 Proposed Order) (Manifold, Betsy) (Entered: 10/06/2014) |
| 10/17/2014 | 37 | DENIED without prejudice to be determined at time of certification by Judge R. Gary Klausner: denying 22 Motion for Appointment as Lead Plaintiff and Approving its Selection of Lead Counsel. (bp) (Entered: 10/17/2014) |
| 10/20/2014 | 38 | ORDER SETTING SCHEDULING CONFERENCE by Judge R. Gary Klausner. A scheduling conference has been placed on calendar for January 12, 2015 at 9:00 a.m. The Conference will be held pursuant to F.R.Civ. P. 16(b). |

| Date Filed | # | Docket Text |
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| | | Trial counsel must be present and there are no telephonic appearances. Counsel are ordered to file a joint statement providing a brief factual summary of the case, including the claims being asserted. The parties are reminded of their obligations to disclose information and confer on a discovery plan not later than 21 days prior to the scheduling conference, and to file a joint statement with the Court not later than 14 days after they confer, as required by F.R. Civ.P. 26 and the Local Rules of this Court. Failure to comply may lead to the imposition of sanctions. Plaintiff's counsel is directed to give notice of the scheduling conference to all parties that have appeared in this action, and is further directed to give notice of the scheduling conference immediately to each party that makes an initial appearance in the action after this date. Not later than 5 court days prior to the Scheduling Conference, coun- |

| Date Filed | # | Docket Text |
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| | | sel are ordered to confer and electronically file (joint) Form ADR-1 (and proposed order, Form ADR 12), selecting one of the three settlement options available. (sw) (Entered: 10/20/2014) |
| 10/20/2014 | 39 | REPLY In Support Of MOTION to Dismiss Defendant Charles Law 27 filed by Defendant Charles Law. (Attachments: # 1 Proposed Order Granting Defendant Charles Law's Motion to Dismiss Plaintiffs' Amended Complaint) (Economou, Cary) (Entered: 10/20/2014) |
| 10/20/2014 | 40 | REPLY In Support Of MOTION to Dismiss The Resh Plaintiffs' Putative Class Action or, In the Alternative, Class Allegations As Barred By Statute of Limitations 28 filed by Defendant China Agritech, Inc.. (Attachments: # 1 Declaration of Seth Aronson in Support (SUPPLEMENTAL), # 2 Exhibit 29 to Aronson Supplemental Declaration)(Aronson, Seth) (Entered: 10/20/2014) |

| Date Filed | # | Docket Text |
|---|---|---|
| 10/20/2014 | 41 | REQUEST FOR JUDICIAL NOTICE re MOTION to Dismiss The Resh Plaintiffs' Putative Class Action or, In the Alternative, Class Allegations As Barred By Statute of Limitations 28 *(SUPPLEMENTAL)* filed by Defendant China Agritech, Inc.. (Aronson, Seth) (Entered: 10/20/2014) |
| 10/27/2014 | 42 | SCHEDULING NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. Defendant China Agritech, Inc.'s Motion to Dismiss The Resh Plaintiffs' Putative Class Action or, In the Alternative, Class Allegations As Barred By Statute of Limitations 28; AND Defendant Charles Law's Motion to Dismiss Defendant Charles Law 27, noticed for hearing on November 3, 2014, have been taken under submission and off the motion calendar. No appearances by counsel are necessary. The Court will issue a ruling after full consideration of properly submit- |

| Date Filed | # | Docket Text |
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| | | ted pleadings. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (sw) TEXT ONLY ENTRY (Entered: 10/27/2014) |
| 12/01/2014 | 43 | MINUTES (IN CHAMBERS): Order re: Defendants Charles Law and China Agritech, Inc.'s Motions to Dismiss (DE 27, 28) by Judge R. Gary Klausner: The Court GRANTS without leave to amend Moving Defendants' Motions to Dismiss. Plaintiffs are hereby ordered to show cause in writing no later than December 8, 2014 as to why the Motions to Dismiss should not be granted as to the remaining defendants. (See document for further details) (bp) (Entered: 12/01/2014) |
| 12/08/2014 | 44 | RESPONSE filed by Movant CAGC Investor Group, Plaintiff Michael H. Reshto Order on Motion to Dismiss Party,,, 43 *Plaintiffs' Response to Court's December 1, 2014 Order to Show Cause* (Manifold, |

| Date Filed | # | Docket Text |
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| | | Betsy) (Entered: 12/08/2014) |
| 12/19/2014 | 45 | NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion to Dismiss Party,,, 43 *Memorandum of Points and Authorities in Support Thereof* filed by Plaintiffs CAGC Investor Group, Michael H. Resh. Motion set for hearing on 1/26/2015 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Proposed Order)(Manifold, Betsy) (Entered: 12/19/2014) |
| 01/05/2015 | 46 | MEMORANDUM in Opposition to MOTION for Reconsideration re Order on Motion to Dismiss Party,,, 43 *Memorandum of Points and Authorities in Support Thereof* 45 *(DEFENDANT CHINA AGRITECH, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER THE COURTS DECEMBER 1, 2014 ORDER RE DEFENDANTS CHINA AGRITECH, INC.'S AND* |

| Date Filed | # | Docket Text |
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| | | *CHARLES LAW'S MOTIONS TO DISMISS)* filed by Defendant China Agritech, Inc.. (Aronson, Seth) (Entered: 01/05/2015) |
| 01/05/2015 | 47 | DECLARATION of MICHELLE C. LEU In Opposition To MOTION for Reconsideration re Order on Motion to Dismiss Party,,, 43 *Memorandum of Points and Authorities in Support Thereof* 45 filed by Defendant China Agritech, Inc.. (Attachments: # 1 Exhibit 1)(Leu, Michelle) (Entered: 01/05/2015) |
| 01/05/2015 | 48 | REQUEST FOR JUDICIAL NOTICE re MOTION for Reconsideration re Order on Motion to Dismiss Party,,, 43 *Memorandum of Points and Authorities in Support Thereof* 45 *(DEFENDANT CHINA AGRITECH, INC.'S REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S DECEMBER 1, 2014 ORDER RE DEFEND-* |

| Date Filed | # | Docket Text |
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| | | *ANTS CHINA AGRITECH, INC.'S AND CHARLES LAW'S MOTIONS TO DISMISS)* filed by Defendant China Agritech, Inc.. (Læu, Michelle) (Entered: 01/05/2015) |
| 01/05/2015 | 49 | JOINDER filed by Defendant Charles Law joining in Declaration (Motion related), 47, MEMORANDUM in Opposition to Motion, 46, Request for Judicial Notice,, Request for Relief, 48. (Economou, Cary) (Entered: 01/05/2015) |
| 01/07/2015 | 50 | MINUTE ORDER IN CHAMBERS Order Re: Dismissal Order as to Plaintiffs' Claims Against Remaining Defendants by Judge R. Gary Klausner: On December 1, 2014, the Court granted motions to dismiss filed by China AG and Law pursuant to Federal Rule of Civil Procedure 12(b)(6), finding that Plaintiffs class action claims were barred by the statute of limitations. The Court ordered Plaintiffs to show cause as to why the Remaining De- |

| Date Filed | # | Docket Text |
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| | | fendants should not also be dismissed from this action. On December 8, 2014, Plaintiffs filed a response to the Order. Plaintiffs fail to provide an adequate reason why, in light of the Courts December 1, 2014 order, the claims against the Remaining Defendants should not also be dismissed. Therefore, the Court DISMISSES the Remaining Defendants. (Made JS-6. Case Terminated.) (bp) (Entered: 01/08/2015) |
| 01/12/2015 | 51 | REPLY in Support of MOTION for Reconsideration re Order on Motion to Dismiss Party,,, 43 *Memorandum of Points and Authorities in Support Thereof* 45 filed by Movant CAGC Investor Group, Plaintiff Michael H. Resh. (Manifold, Betsy) (Entered: 01/12/2015) |
| 01/23/2015 | 52 | NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. Plaintiffs' Motion for Reconsideration re Order on Motion to Dismiss Party 45 noticed for hearing |

| Date Filed | # | Docket Text |
|---|---|---|
| | | on January 26, 2015, has been taken under submission and off the motion calendar. No appearances by counsel are necessary. The Court will issue a ruling after full consideration of properly submitted pleadings. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (pso) TEXT ONLY ENTRY (Entered: 01/23/2015) |
| 02/23/2015 | 53 | MINUTE ORDER IN CHAMBERS by Judge R. Gary Klausner Re: Plaintiffs' Motion for Reconsideration 45. The Court DENIES Plaintiffs' Motion. Refer to the Court's order for details. (pso) (Entered: 02/23/2015) |
| 03/19/2015 | 54 | NOTICE OF APPEAL to the 9th CCA filed by Plaintiffs CAGC Investor Group, Michael H. Resh. Appeal of Minutes of In Chambers Order/Directive - no proceeding held 53, Minutes of In Chambers Order/Directive - no proceeding held,,,, Terminated Case,,, 50, Order on Motion |

| Date Filed | # | Docket Text |
|---|---|---|
| | | for Order 37, Order on Motion to Dismiss Party,,, 43 (Appeal fee of $505 receipt number 0973-15401827 paid.) (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Manifold, Betsy) (Entered: 03/19/2015) |
| 03/19/2015 | 55 | NOTIFICATION by Circuit Court of Appellate Docket Number 15-55432, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals, 54 as to CAGC Investor Group, Michael H. Resh. (car) (Entered: 03/20/2015) |
| 05/24/2017 | 56 | OPINION from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 54 filed by CAGC Investor Group, Michael H. Resh. CCA # 15-55432. We reverse the district court's order of dismissal and remand for further proceedings consistent with this opinion. REVERSED and REMANDED. (mat) (Entered: 05/24/2017) |

| Date Filed | # | Docket Text |
|---|---|---|
| 07/11/2017 | 57 | MANDATE of Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 54,, CCA # 15-55432. The judgment of the 9th Circuit Court, entered May 24, 2017, takes effect this date. This constitutes the formal mandate of the 9th CCA issued pursuant to Rule41(a) of the Federal Rules of Appellate Procedure.[See USCA Opinion 56 REVERSED and REMANDED.](mat) (Entered: 07/13/2017) |
| SUBSEQUENT DOCKET ENTRIES DELETED | | |

# APPENDIX B

## Relevant Court of Appeals Docket Entries

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

### Relevant Docket Entries

*Resh v. China Agritech, Inc.*,
Case No. 15-55432

| Date Filed | # | Docket Text |
|---|---|---|
| 03/19/2015 | 1 | DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 03/26/2015. Transcript ordered by 04/20/2015. Transcript due 07/20/2015. Appellants Heroca Holding, B.V., Ninella Beheer, B.V., Michael H. Resh and William Schoenke opening brief due 08/31/2015. Appellees Gene Michael Bennett, Yu Chang, China Agritech, Inc., Lun Zhang Dai, Charles Law, Yau-Sing Tang, Xiao Rong Teng, Zheng Wang and Ming Fang Zhu answering brief |

| Date Filed | # | Docket Text |
|---|---|---|
| | | due 09/30/2015. Appellant's optional reply brief is due 14 days after service of the answering brief. |
| 03/26/2015 | 2 | Filed (ECF) Appellants Michael H. Resh, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V. Mediation Questionnaire. Date of service: 03/26/2015. |
| 03/31/2015 | 3 | Filed Mediation order: This case is NOT SELECTED for inclusion in the Mediation Program. Counsel may contact circuit mediator to discuss services available through the court's mediation program, to request a settlement assessment conf, or to request a stay of the appeal for settlement purposes. Also, upon agreement of the parties, the brfing sch can be modified or vacated to facilitate settlement discussions. Csl are requested to send copies of this order to their clients. Info regarding the mediation program may be found at |

| Date Filed | # | Docket Text |
|---|---|---|
| | | www.ca9.uscourts.gov/mediation. |
| 08/14/2015 | 4 | Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellants Michael H. Resh, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V.. New requested due date is 09/30/2015. |
| 08/14/2015 | 5 | Streamlined request [4] by Appellants Heroca Holding, B.V., Ninella Beheer, B.V., Michael H. Resh and William Schoenke to extend time to file the brief is approved. Amended briefing schedule: Appellants Heroca Holding, B.V., Ninella Beheer, B.V., Michael H. Resh and William Schoenke opening brief due 09/30/2015. Appellees Gene Michael Bennett, Yu Chang, China Agritech, Inc., Lun Zhang Dai, Charles Law, Yau-Sing Tang, Xiao Rong Teng, Zheng Wang and Ming Fang Zhu answering brief due 10/30/2015. The op- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | tional reply brief is due 14 days from the date of service of the answering brief. |
| 09/30/2015 | 6 | Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellants Michael H. Resh, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V.. Date of service: 09/30/2015. |
| 10/01/2015 | 7 | Filed clerk order: The opening brief [6] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [6] submitted by appel- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | lants. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30¬1.6. [9703991] (KT) |
| 10/06/2015 | 8 | Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee China Agritech, Inc.. New requested due date is 11/30/2015. |
| 10/06/2015 | 9 | Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee Charles Law. New requested due date is 11/30/2015. |
| 10/06/2015 | 10 | Streamlined request [9], [8] by Appellees China Agritech, Inc. and Charles Law to extend time to file the brief is approved. Amended briefing schedule: Appellees China Agritech, Inc. and Charles Law answering brief due 11/30/2015. The optional reply brief is due 14 days |

| Date Filed | # | Docket Text |
|---|---|---|
| | | from the date of service of the answering brief. |
| 10/07/2015 | 11 | Filed Appellants' paper copies of excerpts of record [6] in 2 volume(s). |
| 10/07/2015 | 12 | Received 7 paper copies of Opening brief [6] filed by appellants. |
| 11/30/2015 | 13 | Submitted (ECF) Answering Brief for review. Submitted by Appellee China Agritech, Inc.. Date of service: 11/30/2015. |
| 11/30/2015 | 14 | Submitted (ECF) supplemental excerpts of record. Submitted by Appellee China Agritech, Inc.. Date of service: 11/30/2015. |
| 11/30/2015 | 15 | Filed (ECF) Appellee Charles Law Correspondence: Appellee Charles Law's Notice of Joinder and Joinder in the Answering Brief of Appellee China Agritech, Inc. filed on November 30, 2015. Date of service: 11/30/2015 |
| 12/01/2015 | 16 | Filed clerk order: The answering brief [13] submitted by China Agritech, Inc. |

| Date Filed | # | Docket Text |
|---|---|---|
| | | is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [14] submitted by China Agritech, Inc.. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. |
| 12/03/2015 | 17 | Received 7 paper copies of Answering brief [13] filed by China Agritech, Inc.. |
| 12/03/2015 | 18 | Filed Appellee China Agritech, Inc. paper copies |

| Date Filed | # | Docket Text |
|---|---|---|
| | | of supplemental excerpts of record [14] in 1 volume. |
| 12/09/2015 | 19 | Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellants Michael H. Resh, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V.. New requested due date is 01/13/2016. |
| 12/09/2015 | 20 | Streamlined request [19] by Appellants Heroca Holding, B.V., Ninella Beheer, B.V., Michael H. Resh and William Schoenke to extend time to file the brief is approved. Amended briefing schedule: the optional reply brief is due 01/13/2016. |
| 12/31/2015 | 21 | Filed (ECF) Appellee Charles Law Correspondence: Letter to court regarding removal of M. Taylor Florence from service list due to retirement. Date of service: 12/31/2015 |
| 12/31/2015 | 22 | Terminated M. Taylor Florence for Charles Law in 15-55432 |

| Date Filed | # | Docket Text |
|---|---|---|
| 01/13/2016 | 23 | Submitted (ECF) Reply Brief for review. Submitted by Appellants Michael H. Resh, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V.. Date of service: 01/13/2016. |
| 01/14/2016 | 24 | Filed clerk order: The reply brief [23] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. |
| 01/19/2016 | 25 | Received 7 paper copies of Reply brief [23] filed by appellants. |
| 06/22/2016 | 26 | Filed (ECF) notice of appearance of Matthew M. Guiney for Appellants Mi- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | chael H. Resh, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V.. Date of service: 06/22/2016. |
| 06/22/2016 | 27 | Added attorney Matthew M. Guiney for Heroca Holding, B.V. Michael H. Resh William Schoenke Ninella Beheer, B.V., in case 15-55432. |
| 06/22/2016 | 28 | Filed (ECF) Appellants Michael H. Resh, William Schoenke, Heroca Holding, B.V. and Ninella Beheer, B.V. citation of supplemental authorities. Date of service: 06/22/2016. |
| 06/28/2016 | 29 | Filed (ECF) Appellee China Agritech, Inc. citation of supplemental authorities. Date of service: 06/28/2016. |
| 08/29/2016 | 30 | This case is being considered for the December 2016 Pasadena oral argument calendar. The exact date of your oral argument has not been determined at this time. The following is a link to the upcoming court sessions: |

| Date Filed | # | Docket Text |
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| | | http://cdn.ca9.uscourts.gov/datastore/uploads/calendar/sitdates_2016.pdf. Please review these upcoming dates immediately to determine if you have any conflicts with them. If you do have conflicts, please inform the Court within 3 days of this notice by sending a letter to the Court using CM/ECF (Type of Document: File Correspondence to Court; Subject: regarding availability for oral argument). The Court discourages motions to continue after this 3-day period. The clerk's office takes conflict dates into consideration in scheduling oral arguments but cannot guarantee that every request will be honored. Your case will be assigned to a calendar approximately 10 weeks before the scheduled oral argument date. Note that your case will be set for hearing in due course if it is not assigned to this calendar. In addition, if par- |

| Date Filed | # | Docket Text |
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| | | ties would like to discuss settlement before argument is scheduled, they should jointly request a referral to the mediation unit. Such a referral will postpone the calendaring of oral argument. All such requests must be made within 3 days of this notice by sending a letter to the Court using CM/ECF (Type of Document: File Correspondence to Court; Subject: request for mediation). Once the case is calendared, it is unlikely that the court will postpone argument for settlement discussions. |
| 08/29/2016 | 31 | Filed (ECF) Appellee China Agritech, Inc. Correspondence: regarding availability for oral argument. Date of service: 08/29/2016 |
| 09/26/2016 | 32 | Notice of Oral Argument on Monday, December 5, 2016 - 09:30 A.M. - Courtroom 1 - Pasadena CA. View the Oral Argument Calendar for your case here.<br><br>Be sure to review the GUIDELINES for im- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | portant information about your hearing, including when to arrive (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible).<br><br>When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: PASADENA Office. |
| 09/27/2016 | 33 | Filed (ECF) Acknowledgment of hearing notice. Location: Pasadena. Filed by Attorney Matthew M. Guiney for Appellants Heroca Holding, B.V., Ninella Beheer, B.V., Michael H. Resh and William Schoenke. [10138701] [15-55432] (Guiney, Matthew) |
| 09/27/2016 | 34 | Filed (ECF) Acknowledgment of hearing notice. Location: Pasadena. Filed by Attorney Mr. Seth Alben Aronson for Appellee China |

| Date Filed | # | Docket Text |
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| | | Agritech, Inc.. |
| 09/28/2016 | 35 | Filed (ECF) Acknowledgment of hearing notice. Location: Pasadena. Filed by Attorney Cary Joy Economou, Esquire for Appellee Charles Law. |
| 12/05/2016 | 36 | ARGUED AND SUBMITTED TO STEPHEN REINHARDT, WILLIAM A. FLETCHER and RICHARD A. PAEZ. |
| 05/24/2017 | 37 | FILED OPINION (STEPHEN REINHARDT, WILLIAM A. FLETCHER and RICHARD A. PAEZ) REVERSED AND REMANDED. Judge: WAF Authoring, FILED AND ENTERED JUDGMENT. |
| 06/07/2017 | 38 | Filed (ECF) Appellee China Agritech, Inc. petition for rehearing en banc (from 05/24/2017 opinion). Date of service: 06/07/2017. |
| 06/08/2017 | 39 | Filed (ECF) Appellee Charles Law Correspondence: Notice of joinder to petiton for rehearing. Date of service: 06/08/2017 |

| Date Filed | # | Docket Text |
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| | | [COURT UPDATE: Updated docket text to reflect correct ECF filing type. 06/08/2017 by SLM] |
| 06/19/2017 | 40 | Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Chamber of Commerce of the United States of America and Retail Litigation Center. Date of service: 06/19/2017. |
| 06/19/2017 | 41 | Entered appearance of Amici Curiae Chamber of Commerce of the United States of America and Retail Litigation Center, Inc. |
| 06/19/2017 | 42 | Filed clerk order: The amicus brief [40] submitted by Chamber of Commerce of the United States of America and Retail Litigation Center, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 20 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submit- |

| Date Filed | # | Docket Text |
|---|---|---|
| | | ted electronically. Cover color: green. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. |
| 06/22/2017 | 43 | Received 20 paper copies of Amicus Brief [40] filed by Chamber of Commerce of the United States of America and Retail Litigation Center, Inc. |
| 07/03/2017 | 44 | Filed order (STEPHEN REINHARDT, WILLIAM A. FLETCHER and RICHARD A. PAEZ): The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc, filed June 7, 2017. The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing and the petition for rehearing en banc are DENIED. |

| Date Filed | # | Docket Text |
|---|---|---|
| 07/06/2017 | 45 | Filed (ECF) Appellee China Agritech, Inc. Motion to stay the mandate. Date of service: 07/06/2017. |
| 07/07/2017 | 46 | Filed order (STEPHEN REINHARDT, WILLIAM A. FLETCHER and RICHARD A. PAEZ): Defendants-Appellees' motion for a stay of the mandate pending the filing and disposition of a petition for certiorari is DENIED. |
| 07/11/2017 | 47 | MANDATE ISSUED.(SR, WAF and RAP) |
| 09/26/2017 | 48 | **Supreme Court Case Info**<br>Case number: 17-432<br>Filed on: 09/21/2017<br>Cert Petition Action 1: Pending<br>[10594158] (RR) |
| 12/11/2017 | 49 | **Supreme Court Case Info**<br>Case number: 17-432<br>Filed on: 09/21/2017<br>Cert Petition Action 1: Granted, 12/08/2017 |

## APPENDIX C

### *Resh* Amended Complaint

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

MICHAEL H. RESH, WILLIAM SCHOENKE, HEROCA HOLDING B.V., AND NINELLA BEHEER B.V., On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

CHINA AGRITECH, INC.; YU CHANG; YAU-SING TANG; GENE MICHAEL BENNETT; XIAO RONG TENG; MING FANG ZHU; LUN ZHANG DAI; HAI LIN ZHANG; CHARLES LAW; ZHENG ANNE WANG; and DOES 1 to 10, Inclusive,

Defendants.

Case No. CV 14-05083-RGK (PJWx)

**AMENDED COMPLAINT FOR VIOLATIONS OF THE FEDERAL SECURITIES LAWS**

Michael H. Resh, William Schoenke, Heroca Holding B.V. and Ninella Beheer B.V. ("Plaintiffs") individually and on behalf of all other persons similarly situated, by and through their undersigned attorneys, allege in this Complaint (the "Complaint") the following upon knowledge with respect to their own acts, and upon facts obtained through an independent investigation conducted by their counsel,

which included, *inter alia*: (a) review and analysis of relevant filings made by China Agritech, Inc. ("CAGC" or the "Company") with the United States Securities and Exchange Commission (the "SEC"); (b) review and analysis of defendants' public documents, conference calls and press releases; (c) review and analysis of securities analysts' reports and advisories concerning the Company; (d) information readily obtainable on the Internet; (e) interviews by investigators of several witnesses with personal knowledge of certain relevant facts; (f) investigation of Chinese State Administration of Industry and Commerce ("SAIC") filings;[1] (g) investigation of Chinese State Administration of Taxation ("SAT") filings;[2] and (h) review of the orders entered in pleadings and prior actions formerly and presently pending against the Company, as detailed below; and (i) investigation and analysis of companies alleged to be suppliers of the Company.

## NATURE OF THE ACTION

1. This is a class action on behalf of a class consisting of all persons and entities, other than defendants and their affiliates, who purchased the pub-

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[1] The SAIC (State Administration for Industry and Commerce) is the Chinese government body that regulates industry and commerce in China. It is primarily responsible for business registrations, issuing and renewing business licenses and acts as the government supervisor of corporations. All Chinese companies are required to file financial statements with the Chinese government annually or biannually.

[2] The SAT (State Administration of Taxation) is the People's Republic of China ("PRC") equivalent of the Internal Revenue Service in the U.S.

licly traded common stock of CAGC between November 12, 2009 through March 11, 2011 (the "Class Period"), seeking to recover damages caused by defendants' violations of the federal securities laws (the "Class").

2. This Complaint alleges claims for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 promulgated thereunder, on behalf of all Class members.

3. CAGC is a holding company. Its purported business operations are primarily conducted through its direct and indirect subsidiaries in the PRC. It purports to manufacture and sell organic compound fertilizers and related agricultural products.

4. During the Class Period, CAGC and its officers and directors engaged in a systemic and wide-ranging scheme that fraudulently created nearly all of CAGC's reported revenue and earnings:

- Overstating revenue by at least 1,100% for fiscal 2009 and 1,500% for fiscal 2008.
- Reporting $76.13 million of revenue in 2009 and $45.24 million in 2008 on CAGC's Form 10-Ks filed with the SEC, when the true revenue figures according to CAGC's SAIC and SAT filings in PRC were not more than $6.99 million in 2009 and $2.95 million in 2008.
- Overstating net income by at least 600% for fiscal 2009. Reporting a profit for fiscal 2008, while the Company was in fact losing money.
- Reporting $6.17 million of net income in 2009

and $8.6 million in 2008, when the true net income figures were not more than $0.97 million in 2009 and a net loss of ($1.89) million in 2008.

- Failing to disclose material related party transactions - CAGC signed a contract effective December 8, 2008 to pay Shenzhen Hongchou Technology Co. ("Shenzhen Hongchou"), a company controlled by CAGC's Chief Executive Officer ("CEO") Yu Chang ("Chang") approximately $4.0 million for raw materials.

- CAGC has maintained two materially different sets of financial reports, accounts, and/or records. The first set of records was filed with the SEC for the benefit of investors. Said records were replete with material falsities misrepresenting the Company's business operations. The other set of records, provided to Chinese authorities, reflected results for the Company that were only a tiny fraction of the false figures reported to the SEC that investors relied upon.

5. During the Class Period when CAGC was issuing false and misleading financial statements, Defendants Teng, Tang and Zhu sold over $3.0 million of CAGC stock and CAGC sold approximately $23 million in a public offering to unwitting investors.

6. Then, on March 14, 2011, CAGC's auditor Ernst & Young Hua Ming ("E&Y") stated that it "may not be able to rely on management's representations."

7. That same day, CAGC terminated E&Y's role as auditor and NASDAQ delisted and halted trading in CAGC's stock "in order to protect the public interest."

8. In the wake of the scandal, nearly all of the Company's directors and officers resigned.

9. CAGC has not filed its annual report for 2010 on Form 10-K with the SEC, which was originally due on March 16, 2011. Consequently, on October 17, 2012 the SEC issued an enforcement order revoking the registration of CAGC's stock. Thus, CAGC's stock is no longer publicly traded, effectively rendering it worthless. The last trade of CAGC shares prior to the revocation order was at $0.16/share. To date, CAGC still has not filed any reports with the SAC.

10. CAGC's false statements have caused investors substantial losses as its shares have dropped from $10.78/share to nearly zero as a result of defendants' violations of the securities laws.

## JURISDICTION AND VENUE

11. The Exchange Act claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b) and 78t(a)) and SEC Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

12. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331.

13. Venue is proper in this Judicial District pursuant to Section 27 of the Exchange Act (15 U.S.C. §

78aa), 28 U.S.C. § 1391(b), 28 U.S.C. § 1391(d).

14. In connection with the acts, conduct and other wrongs alleged herein, Defendants either directly or indirectly used the means and instrumentalities of interstate commerce, including but not limited to the United States mails, interstate telephone communications and the facilities of the national securities exchange.

**PARTIES**

15. Plaintiff Michael H. Resh purchased CAGC common stock during the Class Period and has suffered damages as a result.

16. Plaintiff William Schoenke purchased CAGC common stock during the Class Period and has suffered damages as a result.

17. Plaintiff Heroca Holding B.V. purchased CAGC common stock during the Class Period and has suffered damages as a result.

18. Plaintiff Ninella Beheer B.V. purchased CAGC common stock during the Class Period and has suffered damages as a result.

19. Defendant CAGC is a Delaware corporation incorporated in 2004. During the Class Period, its principal executive offices were located at Room 3F, No. 11 Building, Zhonghong International Business Garden, Future Business Center, Chaoyang North Road, Chaoyang District, Beijing, China 100024, and a CAGC subsidiary, CAI Investment Inc., a California corporation in good standing. Based upon investigation of counsel, CAI Investment Inc. purportedly maintains office(s) located at 925 Mill Page Road, Palo Alto, California 94304-1013, 970 Wallace Drive,

San Jose, California 95120, either or both.[3]

20. CAGC, through its subsidiaries, purports to manufacture and sell organic compound fertilizers and related agricultural products in the PRC.

21. To have its stock publicly traded in the United States, CAGC employed a device called a "reverse merger" in 2005. In a reverse merger, a publicly traded shell company acquires the private company seeking to go public. In exchange, the shareholders of the former private company receive a controlling share of the public company.

22. As a result of the reverse merger, CAGC became a holding company that primarily operates through its subsidiaries in the PRC.

23. Defendant Chang was and is the Company's CEO, President, Secretary and, Chairman of the Board at all relevant times herein. In addition, Defendant Chang was a substantial shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and 2009 10-K, Defendant Chang owned 41.96% and 40.23% of the Company's stock, respectively. Chang was and is the President of CACG's California wholly-owned subsidiary, CAI Investment Inc. Chang was also a 90% owner of CAGC's third largest supplier during the relevant time period. *See* ¶ 82, *infra*.

24. Defendant Yau-Sing Tang a/k/a Gareth Tang

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[3] *See* China Agritech, Inc., Annual Report, Ex. 21 (Form 10-K) (Apr. 2, 2007); *see also* California Sec. of State, Business Entities, http://kepler.sos.ca.gov (query "CAI Investment" after selecting "Corporation Name"; then follow "CAI Investment Inc." hyperlink).

("Tang") was the Company's Chief Financial Officer ("CFO") and Controller from October 2008 through January 16, 2012—when he suddenly resigned. In addition, Defendant Tang was a shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and 2009 10-K, Defendant Tang owned 0.4% and 1.04% of the Company's stock, respectively.

25. Defendant Gene Michael Bennett ("Bennett") was a director of CAGC from October 2008 through June 7, 2012—when he resigned. At all times during the Class Period, Bennett was the chair of CAGC's Audit Committee until his resignation from the Audit Committee on or about April 25, 2011, as well as a member of CAGC's Nominating and Governance Committee. After the CAGC Defendants' fraud was disclosed, Bennett was the chair of the Company's Special Committee investigating the allegations of fraud, until he resigned from the Special Committee on April 25, 2011.

26. Bennett has served as an officer and/or director of numerous Chinese reverse merger frauds. Bennett served as a director and CFO of Duoyuan Printing, Inc.—which is the target of an SEC investigation for filing materially false and misleading financial statements.

27. Bennett also served as director of China Shenghuo Pharmaceutical Holdings—a company like Duoyuan, that was subject to civil securities class action lawsuits. According to a March 30, 2011, Bloomberg BusinessWeek article, Bennett's biographies listed in certain SEC filings of companies where he was employed, misstated his qualifications.

Contrary to the descriptions, Bennett never worked with the accounting firm of Grant Thornton and he never received a law degree from the University of Michigan. The misstated qualifications appeared in China Pharma Holdings, Inc.'s ("China Pharma") 2008 and 2009 10-K. Interestingly, China Pharma was represented by defendant Charles Law and his law firm, King & Wood, in connection with its securities' registration, and in 2011, China Pharma had to restate its financial statements for fiscal years 2009 and 2010.

28. Defendant Xiao Rong Teng ("Teng") was and is a director of CAGC at all relevant times herein. Teng also served as the Company's Chief Operating Officer ("COO") from February 2005 to March 2009. Teng was also a director of Pacific Dragon since 2000, and a director of Tailong since 2003. In addition, Teng was a substantial shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and 2009 10-K, Teng owned 2.53% and 2.15% of the Company's stock, respectively.

29. Defendant Ming Fang Zhu ("Zhu") was CAGC's COO from March 2009 through May 27, 2011- when he resigned. From April 2007 to March 2009, Zhu served as President of Beijing Agritech Fertilizer Co, Ltd., an indirect subsidiary of the Company.

30. Defendant Lun Zhang Dai ("Dai") was and is a director of CAGC at all relevant times. Dai also serves as a member of the Company's Audit Committee, Compensation Committee and Nominating and Governance Committee. Dai is referred to in

CAGC's SEC filings as Lun Zhang Dai and Lunzhang Dai. Defendant Dai's daughter Lingxiao Dai also became employed by the Company on May 1, 2009 as Vice President of Finance, and has been the head of the Company's internal audit department since January 2010.

31. Defendant Hai Lin Zhang ("Zhang") was a director of CAGC from October 2008 through March 13, 2012—when Zhang resigned. Zhang also served as a member of the Company's Audit Committee, Compensation Committee and Nominating and Governance Committee during his entire tenure on the Board. Zhang is referred to in CAGC's SEC filings as Hai Lin Zhang and Hailin Zhang.

32. Defendant Charles Law a/k/a Charles C. Law, Chien-Lee C. Loh, Charles Chien-Lee Law, and Charles Chien-Lee Loh. (together "Law") was a director of CAGC from January 2010 until his resignation in February 2011. Law also served on the Compensation and Nominating and Governance Committees during his that time. According to the Company's SEC filings, Law is a qualified U.S. attorney who has an understanding of SEC compliance requirements. Law's law firm, King & Wood, represented CAGC in connection with CAGC's initial reverse merger registration. It appears that Law and/or King & Wood have been involved with registration of many Chinese reverse merger companies.

33. Defendant Zheng "Anne" Wang ("Wang") was a director of CAGC from December 2009 until March 14, 2011. According to a Schedule 14A filed by CAGC with the SEC on July 21, 2010, Wang has been Vice-President of Carlyle Asia Growth Capital,

a subsidiary of the private equity firm The Carlyle Group ("Carlyle"), since December 2007, and Wang was Carlyle's designee to CAGC's board and was determined by the Board of Directors not to be an "independent director."

34. Defendants Chang, Tang, Bennett, Teng, Zhu, Dai, Zhang, Law, and Wang are collectively referred to hereinafter as the "Individual Defendants."

## PROCEDURAL HISTORY

35. Stockholders sued CAGC and its officers and directors concerning the issues related in this Complaint on two prior occasions and other stockholders commenced a derivative litigation in Delaware Chancery Court on behalf of the Company against members of its Board of Directors which were consolidated and remain pending. In each of these cases, a court has denied defendants' motions to dismiss the pleading.

36. Specifically, on February 2, 2011, Theodore Dean ("Dean"), on behalf of himself and all others similarly situated, filed a complaint against CAGC and several individual defendants, including members of CAGC's executive management team and board of directors. See *Dean v. China Agritech, et al.*, Case No. CV 11-1331-RGK (C.D. Cal.) (the "*Dean* Action") (Dkt. 1). On June 22, 2011, Mr. Dean filed an amended complaint, which added Slava Vanous, Randolph Daniels-Kolin, Clair Harpster, and Tan Tee Yong as plaintiffs. *Id.* (Dkt. 30). It also added several additional individual defendants, Rodman and Renshaw, LLC, and Crowe Horwath, LLP, as defendants. *Id.* The amended complaint alleged claims for violations of: (1) Section 10(b) of the Ex-

change Act and SEC Rule 10b-5 against CAGC and all individual defendants; (2) Section 20(a) of the Exchange Act against the individual defendants; (3) Section 11 of the Securities Act of 1933 ("Securities Act") against all defendants; and (4) Section 15 of the Securities Act against the individual defendants.

37. On October 27, 2011, Judge R. Gary Klausner of this Court granted in part and denied in part Defendants' motions to dismiss in the *Dean* Action. *See* Order Deny'g Mots. to Dismiss *Dean* Action (Dkt. 85) (Oct. 27, 2011). Judge Klausner' s order stated that the *Dean* Action's amended complaint sufficiently alleged Exchange Act claims against CAGC and the Individual Defendants while dismissing plaintiffs' Securities Act claims that were brought against these same defendants and the other defendants. *Id.*

38. Upon information and belief premised upon a review of the docket and conversations with the prior counsel representing plaintiffs in the *Dean* Action, on or about January 6, 2012, the *Dean* plaintiffs, by their counsel, moved to certify a class pursuant to Rule 23 of the Federal Rules of Civil Procedure. Pls.' Mot. to Certify Class, *Dean* Action (Dkts. 94-96). On May 3, 2012, however, Judge Klausner denied the motion. *See* Order Deny'g Pls.' Mot. to Certify Class, Dean Action (Dkt. 134) (May 3, 2012). In so ruling, Judge Klausner held that the *Dean* plaintiffs failed to satisfy the second and fifth factors under *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989). *Id.* First, plaintiffs' expert failed to list the number of securities industry analysts that covered CAGC, therefore there was insufficient record evidence supporting a finding of market efficiency. *Id.* Second, the Court found that plaintiffs' two different experts came to

separate conclusions concerning whether there was a causal relationship between CAGC's disclosures and movement in the price of its stock. *Id.* Accordingly, class certification was denied because plaintiffs failed to demonstrate that CAGC's stock traded on an efficient market, and, thus, plaintiffs were not entitled to the fraud-on-the-market presumption of reliance. *Id.*

39. The *Dean* plaintiffs filed a Rule 23(f) of the Federal Rules of Appellate Procedure petition with the Ninth Circuit Court of Appeals seeking interlocutory review of the denial of class certification, but on August 8, 2012, the Ninth Circuit denied the *Dean* plaintiffs' petition. *See* Order from the 9th CCA, *Dean* Action (Dkt. 164) (Aug. 8, 2012).

40. On September 14, 2012, the plaintiffs entered into an agreement of settlement with defendants on an individual basis and the case was dismissed on September 20, 2012 by order of the Court. *See* Stipulation of Settlement (Dkt. 204) and Order (Dkt. 205), *Dean* Action.

41. Undeterred, on October 4, 2012, the same counsel as in the *Dean* Action filed a new complaint in the District of Delaware styled *Smyth v. Yu Chang, et al.*, 1:12-cv-01262, which alleged substantially the same claims on behalf of the same putative class as was alleged in the *Dean* Action (the "*Smyth* Action"). The *Smyth* Action subsequently was transferred to the Central District of California (*see* Order Grant'g CACG's Mot. to Transfer, *Smyth* Action (Dkt. 41, Apr. 19, 2013)), where it was eventually deemed related to the *Dean* Action and reassigned to Judge Klausner. *See* Order re Transfer Pursuant to

Gen. Order 8-05, *Smyth* Action (Dkt. 54) (May 10, 2013).

42. On July 18, 2013, Mr. Smyth, along with Te Gyun Kim, Premium Alliance Investment Limited, San Chul Han, HSP Investment Limited, and Seung Ho Lee filed an Amended Class Action Complaint against CAGC and members of its executive management team and board of directors alleging violations under the Exchange Act (the "Kim Group"). *See* Amended Compl., *Smyth* Action (Dkt. 76). And again, on September 26, 2013, Judge Klausner denied defendant China Agritech's motion to dismiss for substantially the same reasons related in the *Dean* Action's decision denying the motion to dismiss. *See* Order Deny'g CACG's Mot. to Dismiss, *Smyth* Action (Dkt. 113).

43. On the same day, however, Judge Klausner ruled on two competing motions seeking appointment as lead plaintiff (*see* Mots. for Appointment of Lead Pl. (DE Dkts. 4&5)) and the Kim Group's motion for class certification (*see* Mot. Class Cert. (DE Dkt. 85). *See* Order Deny'g Mots., *Smyth* Action (Dkt. 112) (Sep. 26, 2013). In denying the Kim Group's motion for class certification, Judge Klausner found that the members of the group were inadequate class representatives and their claims were atypical because its members faced unique defenses. *See id.* With respect to typicality, the Court ruled that since the members of the Kim Group were associated with the *Dean* plaintiffs and may have controlled the earlier movants' litigation strategy in part, whose claims were not certified, the defendants could avail themselves of the defense of claim preclusion. *Id.* Next, the Court found the members of

the Kim Group and its chosen counsel inadequate. *Id.* The inadequacy of the Kim Group was founded on its members' failure to execute new plaintiffs' certification and their reliance on the certification filed over two years ago in the *Dean* Action. *Id.* Moreover, counsel's adequacy was questioned because it failed to serve defendants for years, communicate with the movants in a timely manner, and otherwise prosecute the case vigorously. *See id.*

44. On January 8, 2014, the parties once again executed a stipulation of dismissal even though on two prior occasions Judge Klausner sustained claims under the Exchange Act and twice declined to certify a class premised on a combination of suspect decision making by proposed plaintiffs' counsel, ineffective expert reports concerning market efficiency, and proposed class representatives who failed to properly execute the requisite paperwork demonstrate their standing and/or disclose their prior relationship with former movants who were not certified. *See* Stip. to Dismiss Case, *Smyth* Action (Dkt. 135). In short, class certification was denied twice based on avoidable errors, not because the claims were otherwise unfit for adjudication on a class wide basis. *See* Order Grant'g Dismissal, *Smyth* Action (Dkt. 136) (Jan. 9, 2014).

45. In addition to the actions pending in this federal court, a now-consolidated derivative action was filed in Delaware Chancery Court on or about January 10, 2012, on behalf of the Company against certain of its officers and directors, amended on or about September 14, 2012, and remains pending in Delaware Chancery Court. *See In re ChinaAgritech, Inc. Shareholder Derivative Litig.*, Case No. 7163-

VCL, Court of Chancery, State of Delaware (the "Derivative Action").

46. On or about May 21, 2013, Vice Chancellor Laster denied defendants' motions to dismiss. *See* Order Deny'g Defs.' Mots. to Dismiss, Derivative Action (Dkt. 145).

## DEFENDANTS' MATERIAL OMISSIONS AND MISREPRESENTATIONS

### I. The 2009 Q3 10-Q is False and Materially Misstated

47. The Class Period begins on November 12, 2009 when the Company filed with the SEC its report for the third quarter of 2009 on Form 10-Q ("2009 Q3 10-Q") containing false and misleading financial statements.

48. The false and misleading 10-Q was signed by defendants Chang and Tang. Chang and Tang also signed the accompanying Sarbanes-Oxley ("SOX") certifications, attesting to the accuracy of CAGC's financial statements.

49. The 2009 Q3 10-Q was false because it materially misstated CAGC's revenue and net income for the quarter.

### II. CAGC's 2009 10-K is False and Materially Misstated

50. On April 1, 2010, the Company issued its fiscal 2009 annual report on form 10-K ("2009 10-K") containing false and misleading financial statements for fiscal years 2008 and 2009.

51. The false and misleading 2009 10-K was signed by defendants Chang, Tang, Teng, Bennett,

Dai, Zhang, Law and Wang. Defendants Chang and Tang signed the accompanying SOX certifications, attesting to the accuracy of CAGC's financial statements.

52. CAGC's 2009 10-K described its revenue recognition policy as:

Sales revenue is recognized at the date of shipment from the Company's facilities to customers when a formal arrangement exists, the price is fixed or determinable, the delivery is completed, ownership has passed, no other significant obligations of the Company exist and collectibility is reasonably assured.

53. The 2009 10-K was false and materially misstated because: (i) It materially misstated the Company's revenue and net income for fiscal year 2008 and 2009; and (ii) it concealed material related party transactions.

## III. CAGC Kept Two Materially Different Sets of Books and Reported Drastically Different Revenue and Income to the SEC and SAIC/SAT

54. The revenue and net income reported by CAGC with the PRC SAIC and SAT authorities for fiscal 2008 and 2009 are substantially less than that reported by CAGC with the SEC which CAGC investors relied upon, which demonstrates that the Company kept two materially different sets of books, reporting drastically different numbers to PRC authorities and U.S. investors.

55. According to CAGC's SEC filings, in 2009 CAGC had four operating subsidiaries located in the PRC: Beijing Agritech, Pacific Dragon, Anhui

Agritech, and Xinjiang Agritech.

56. Plaintiffs' counsel obtained financial statements filed by the four subsidiaries with both the SAIC and SAT.

57. The financials reported by each of CAGC's subsidiaries with the SAIC and SAT for *entire fiscal year* 2008 are substantially similar to each other, yet in total, all of their filings report revenue and income that are substantially less than the revenue and income CAGC reported in its 2008 10-K with the SEC.[4]

**2008 SAIC Financials**

| Subsidiary | Net Revenue | | Net Income | |
|---|---|---|---|---|
| Anhui Agritech | ¥ -615,501 | $ (89,799) | ¥ 3,853,674 | $ 562,236 |
| Beijing Agritech | ¥ -12,371,779 | $ (1,805,000) | ¥ 15,828,939 | $ 2,309,380 |
| Pacific Dragon | ¥ 3,935 | $ 574 | ¥ 535,629 | $ 78,146 |
| Xinjian Agritech | ¥ - | $ - | ¥ - | $ - |
| Total | ¥ -12,983,346 | $ (1,894,225) | ¥ 20,218,242 | $ 2,949,762 |

**2008 SAT Financials**

| Subsidiary | Net Revenue | | Net Income | |
|---|---|---|---|---|
| Anhui Agritech | ¥ -1,650,000 | $ (237,410) | ¥ 210,000 | $ 30,215 |

[4] Currency conversion of 6.95 CHY to $1.00 USD (the average spot close for 2008) was used for each of the charts in this paragraph.

| | | | | |
|---|---|---|---|---|
| Beijing Agritech | ¥ -12,370,000 | $ (1,779,856) | ¥ 15,820,000 | $ 2,276,258 |
| Pacific Dragon | ¥ -10,000 | $ (1,438) | ¥ 530,000 | $ 76,259 |
| Xinjian Agritech | ¥ - | $ - | ¥ - | $ - |
| Total | ¥ -14,030,000 | $ (2,018,704) | ¥ 16,560,000 | $ 2,382,733 |

58. Therefore, in fiscal year 2008, the Company reported $45.24 million net revenue and $8.64 net income to the SEC, yet, the revenue it reported to the PRC SAIC and SAT was less than $3 million, with a net loss of more than ($1.89) million.

59. As such, CAGC overstated its net income and fabricated a profitable fiscal year for 2008 while the Company was in fact losing money, as shown below:

| **(In USD million)** | **SEC 2008** | **SAIC 2008** | **SAT 2008** | **Amount of Overstatement from SAIC to SEC** |
|---|---|---|---|---|
| Net Revenue | $45.24 | ($1.89) | ($2.02) | $47.13 |
| Net Income | $9.83 | $2.95 | $2.38 | $6.88 |

60. Similarly, as set forth below, the financials reported by each of CAGC' s subsidiaries with the SAIC and SAT for *entire fiscal year* 2009[5] are substantially similar to each other, yet in total, all of

[5] Currency conversion of 6.83 CHY to $1.00 USD (the average spot close for 2009) was used for each of the charts in this paragraph.

their filings report revenue and income that are substantially less than the revenue and income CAGC reported in its 2009 Q3 10-Q with the SEC alone.

**2009 SAIC Financials**

| Subsidiary | Net Revenue | | Net Income | |
|---|---|---|---|---|
| Anhui Agritech | ¥ 532,670 | $77,908 | ¥ -941,402 | $(137,688) |
| Beijing Agritech | ¥ 46,657,252 | $6,824,030 | ¥ 7,615,990 | $1,113,900 |
| Pacific Dragon | ¥ 583,828 | $85,390 | ¥-72,137 | $(10,551) |
| Xinjian Agritech | ¥ - | $ - | ¥ - | $ - |
| Total | ¥ 47,773,750 | $6,987,328 | ¥ 6,602,451 | $965,661 |

**2009 SAT Financials**

| Subsidiary | Net Revenue | | Net Income | |
|---|---|---|---|---|
| Anhui Agritech | ¥ 530,000 | $77,599 | Y- 940,000 | $(137,628) |
| Beijing Agritech | ¥ 46,640,000 | $6,828,697 | ¥ 7,610,000 | $1,114,202 |
| Pacific Dragon | ¥ 580,000 | $84,919 | ¥-70,000 | $(10,249) |
| Xinjian Agritech | ¥ 3,820,000 | $559,297 | ¥ -250,000 | $(36,603) |
| Total | ¥ 51,570,000 | $7,550,512 | ¥ 6,350,000 | $929,722) |

| (In USD Million) | SEC Nine Months Ended Sept. 30, 2009 | SAIC for entire fiscal year 2009 | SAT for entire fiscal year 2009 |
|---|---|---|---|
| Net Revenue | $55.38 | $6.99 | $7.55 |
| Net Income | $12.83 | $0.97 | $0.93 |

61. Therefore, for fiscal 2009, while the Company reported $76.13 million net revenue and $6.17 net income to the SEC, CAGC reported revenue to the PRC SAIC and SAT that was less than $7 million, with net income of less than $1 million, therefore overstating its revenue and net income for fiscal 2009 in its SEC filings, as shown below.

| (In USD million) | SEC 2009 | SAIC 2009 | SAT 2009 | Amount of Overstatement from SAIC to SEC |
|---|---|---|---|---|
| Net Revenue | $76.13 | $6.99 | $7.55 | $69.14 |
| Net Income | $6.17 | $0.97 | $0.93 | $5.2 |

62. The financial statements filed by CAGC via its subsidiaries with the two PRC government authorities indicate the true financial performance of the Company because:

- Under PRC law, penalties for filing false SAIC filings include fines and revocation of the enti-

ty's business license.[6]

- If an entity's business license is revoked, the People's Bank of China[7] requires all bank accounts of that entity be closed.[8]
- Without a business license the entity cannot legally conduct any business.[9]
- The financial statements CAGC filed in the PRC with the SAIC are required by law to be prepared according to PRC GAAP and audited by PRC CPA firms.[10]

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[6] Order No. 23, Measures for the Annual Inspection of Enterprises (promulgated by the State Administration for Industry and Commerce, Feb. 24, 2006), at art. 20 (China), http://www.fdi.gov.cn/180000121_39_4741_0_7.html (hereafter "*Measures for the Annual Inspection of Enterprises*").

[7] *See* The People's Republic Bank of China, http://www.pcb.gov.cn/publish/english/963/index.html (follow "About Us" hyperlink) (last visited June 23, 2014).

[8] The People's Republic Bank of China, http://www.pcb.gov.cn/publish/english/963/index.html, at art. 49 (Apr. 25, 2003) (China) (follow "Rules & Regulations" hyperlink; then follow "Next" hyperlink; then follow first "Administrative Rules for RMB Bank Settlement Accounts 2003-04-25" hyperlink) (last visited June 23, 2014).

[9] SAIC, *Mission* at No. 2 (promulgated by the State Administration for Industry & Commerce for the People's Republic of China) *available at* http://www.saic.gov.cn/english/aboutus/Mission/.

[10] Agritech Fertilizer Limited's 2008 and 2009 financial statements filed with the SAIC were audited by Beijing Zhonghui Xingcheng CPA Firm and signed by Yu Chang. Pacific Dragon Fertilizer Co., Ltd.'s 2008 and 2009 financial statements were audited by Heilongjiang Huaxin CPA Firm and signed by Yu Chang. Xinjiang Agritech Agricultural Develop-

- Under PRC law, filing false tax documents is a crime subject to severe criminal and civil penalties, including imprisonment.[11]

## IV. The Drastic Differences Between the Chinese and U.S. Filings Cannot be Explained by Different Accounting Treatment

63. Chinese Generally Accepted Accounting Principles ("PRC GAAP") and U.S. Generally Accepted Accounting Principles ("US GAAP") are substantially the same. In particular, for revenue recognition for sales of goods, US GAAP, PRC GAAP and CAGC's stated revenue recognition policy are the same.

64. First, authoritative bodies have specifically noted that there are no significant differences between PRC GAAP and US GAAP. For example, the Committee of European Securities Regulators, in a paper entitled "CESR's advice on the equivalence of Chinese, Japanese and US GAAPs (2007)," noted

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ment Co., Ltd.'s 2008 and 2009 financial statements were audited by Xinjiang Runtong CPA Firm and signed by Yu Chang. Anhui Agritech Development Co., Ltd.'s 2008 and 2009 financial statements were audited by Bengbu Tianyi CPA Firm and signed by Yu Chang.

[11] Crimes Jeopardizing Administration of Tax Collection (promulgated by the Standing Comm. Nat'l People's Cong. July 1, 1979 and by Order No. 83 of the Pres. of the People's Republic of China, Mar. 14, 1997), art. 201 (1979) (China), *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm; *see also* Administration of Tax Collection (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective May 1, 2011), art. 63 (2011) (China) *available at* http://english.gov.cn/laws/2005-09/12/content_31187.htm.

that there were no significant differences between US GAAP and International Financial Reporting Standards ("IFRS").[12]

65. There are no significant differences between IFRS and Chinese GAAP on revenue recognition.[13] Thus, transitively, there are no significant differences between PRC GAAP or US GAAP with respect to revenue recognition.

66. The law firm K & L Gates LLP has represented to the U.S. Securities & Exchange Commission in an October 27, 2010 letter that: "The basic accounting principles and practice of Chinese GAAP are similar to US GAAP. There are no substantial differences between Chinese GAAP and U.S. GAAP."[14]

67. Thus, there are no significant differences between US GAAP and PRC GAAP that can explain the differences in CAGC's SAIC financial statements and those it filed with the SEC.

68. The 2009 Q3 10-Q describes its revenue recognition policy as:

The Company's revenue recognition policies are in compliance with Staff Accounting Bulletin 104. Sales revenue is recognized at the date of shipment to customers when a formal arrangement exists, the price is fixed or determinable, the delivery is com-

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[12] *See* http://www.iasplus.com/en/binary/europe/0712cesrequivalence.pdf at 25, 2nd entry on page.

[13] *Id.* at 35, 6th entry on page.

[14] China Agritech, Inc., Quarterly Report for Period Ended Sep. 30, 2009 (Form 10-Q) (Nov. 12, 2009)

pleted, no other significant obligations of our Company exist and collectibility is reasonably assured.

The Company's revenue consists of the invoiced value of goods, net of a value-added tax ("VAT") and marketing rebate.

69. The Chinese Accounting Standard for Business Enterprise ("ASBE") No. 14, governs revenue recognition for CAGC's PRC subsidiaries, and is similar. It states:

> Chapter II Revenue from Selling Goods
>
> Article 4. No revenue from selling goods may be recognized unless the following conditions are met simultaneously:
>
> (1) The significant risks and rewards of ownership of the goods have been transferred to the buyer by the enterprise;
>
> (2) The enterprise retains neither continuous management right that usually keeps relation with the ownership nor effective control over the sold goods;
>
> (3) The relevant amount of revenue can be measured in a reliable way;
>
> (4) The relevant economic benefits may flow into the enterprise; and
>
> (5) The relevant costs incurred or to be incurred can be measured in a reliable way.

70. Accordingly, there are no significant differences between US GAAP and Chinese GAAP for recognizing revenue in CAGC's case, and such differences cannot account for the huge differences in rev-

enue and income between CAGC's SEC filed financial statements and its SAIC and SAT statements. Fraud is the only plausible explanation.

71. According to its 2009 10-K, CAGC's main business is to "manufacture and sell organic liquid compound fertilizers, organic granular compound fertilizers and related agricultural products in the PRC...." Thus, there is no other source of operating revenue and operating income other than those PRC subsidiaries, whose financials are reported to PRC authorities in SAIC and SAT filings that have been combined for the purposes of the above comparisons with CAGC's SEC filings.

## V. Plaintiffs' Investigation of CAGC's Factories Indicates Defendants' Engaged In Fraud

72. CAGC's fraudulent revenue reporting has also been verified by Plaintiffs' investigators' site visits to CAGC's factories, which either sat idle with no production or operated substantially below capacity.

73. According to Plaintiffs' investigator, CAGC subsidiary Beijing Agritech's factory was non-operational, with no significant operations.[15]

- Plaintiffs' investigators visited Beijing Agritech's factory in Pinggu, Beijing on a weekday in early June, 2011. The investigators found no evidence of operations at the factory. The gate was locked. They did not see

[15] Though CAGC did not disclose in its SEC filings about annual production of Beijing Agritech, it did confirm in its February 10, 2011 Letter to Shareholders that the factory in Beijing is fully operational.

any movement of workers or machines through the window. There were no trucks or vehicles entering or exiting.

- When the investigators inquired to the gatekeepers about meeting with or talking to the sales department, they were refused entry to the factory. Nor would the gatekeepers provide any contact information for factory management. The two gatekeepers said currently no officer or manager was in the factory and no one was expected in the factory for another month and that the gatekeepers were currently the only persons in charge of the whole factory.

- The investigators also visited the local government department that supervises and regulates CAGC's (and that factory's) business. The department is known as the Administrative Committee of Beijing Xinggu Economic Development Zone. This is the government administrative organ that has responsibility for overall management of the economic zone in which CAGC's factory resides. Plaintiffs' investigator interviewed the director of the General Administrative Office's Investment Promotion Division I, and was told by him that the Administration Committee's several requests for routine site visits were always refused, and they always kept their door shut. The director also told Plaintiffs' investigator that "[a]ccording to them, most of their manufacturing activities were conducted in facilities elsewhere."

- Plaintiffs' investigators also visited the Beijing Xinggu District Administration of Quality and Technology Supervision, as the director of the General Administrative Office's Investment Promotion Division I had indicated this government body was in charge of issuing manufacturing permits for fertilizer. At the Beijing Xinggu District Administration of Quality and Technology Supervision, the investigators were informed that while that office did not issue such permits, they could inquire as to such permits and they confirmed that CAGC did not apply for or receive any fertilizer manufacturing permits.
- In addition, Plaintiffs' investigator conducted a search on the website of the Beijing Municipal Administration of Quality and Technology Supervision and found that a fertilizer manufacturing permit is issued only when a company has passed all reviews and random inspections required.

74. For Anhui Agritech, CAGC released pictures inside the factory in February 2011,[16] in an effort to rebut the negative facts in the report issued by the Lucas McGee Research on February 2, 2011 (the "LM Report").[17] Those pictures, however, show that the company did not have basic equipment, such as

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[16] *See* http://brontecapital.blogspot.com/2011/02/china-agritech-more-miracles-in-plant.html.

[17] *See* LucasMcGee Research File, *China Agritech is a Scam* (Feb. 2011) *available at* http://lucasmcgeeresearch.files.wordpress.com/2011/02/china-agritech-a-scam.pdf. (hereafter "LM Report").

forklifts, necessary for operations. One picture showed that human laborers were used to move the 40kg (881b.) fertilizer bags manually. Since this factory was reported to manufacture 100,000 tons of granular fertilizer annually, it means 37 workers have to move 2.5 million bags weighing 40kg each year (185 bags/day per person assuming they work 365 days a year), an impossible method of operation.[18]

75. As to Xinjiang Agritech, it was not incorporated until December 2008. According to the LM Report, the Xinjiang Agritech plant is actually a warehouse, shared with two other companies and demonstrates no activity.

76. In summary, CAGC materially overstated it production.

77. In addition, financial statements filed by CAGC subsidiary Pacific Dragon with local SAIC show its revenue for 2008 and 2009 was only $76,811 and $85,294, respectively, far less than the purported annual rent stated in SEC filed financial statements in $518,940.

78. There is no viable reason that any company would spend six times its revenue for rent expenses.

79. Similarly, the financial statements filed by CAGC subsidiary Anhui Agritech with the local SAIC show its revenue for 2009 was only $77,941, far less than the purported annual rent of $432,900 re-

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[18] This educated estimate based on CAGC's total employees and production capacity of each subsidiary assumes a bag is moved only once following production.

ported in CAGC's SEC filings.

80. As shown by the discrepancy between the PRC SAIC revenue, income and expenses, CAGC has been keeping two materially different sets of books, one for the PRC authorities and one for the SEC.

## VI. Related Party Transactions

81. The 2009 10-K was false and misleading also because it concealed related party transactions with CAGC's CEO Chang.

82. CAGC's third largest supplier - Shenzhen Hongchou—was 90% owned by CAGC CEO, President, Secretary and Chairman of the Board Defendant Chang at all relevant times until at least January 5, 2011, when he claims to have transferred his shares to another individual, Haibo Li.[19]

83. US GAAP, Statement of Financial Accounting Standards ("SFAS"), and SEC regulations required the Company to disclose all material related party transactions.

84. Statement of Financial Accounting Standards ("SFAS") No. 57 and No. 850 provide that a public company's "[f]inancial statements shall include disclosures of material related party transactions. . . ." SFAS No. 57 ¶ 2.[20]

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[19] Perhaps not coincidentally, Ms. Haibo Li' s mother is the owner of Harbin Hai Heng Chemical Dist. Co., another principal supplier to CAGC (supplying 17% of CAGC's raw materials).

[20] *See* http://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175820909171&blobheader=application%2Fpd

85. "Related party transactions" include those between "an enterprise and its principal owners, management, or members of their immediate families" and those between a company and its "affiliates." *Id.*, at ¶ 1. "Affiliate" includes any company that is under common control or management with the public company. Id., at ¶ 24(a, b).

86. Disclosures of related party transactions shall include (a) the nature of the relationship involved, (b) a description of the transactions for each period for which income statements are presented and such other information necessary to an understanding of the effects of the transactions on the financial statements, (c) the dollar amount of transactions for each of the periods for which income statements are presented, and (d) amounts due from or to related parties as of the date of each balance sheet presented and, if not otherwise apparent, the terms and manner of settlement. *Id.*, at ¶ 2.

87. PRC GAAP is substantially the same as GAAP as they both require disclosure in the financial statements of related party transactions. The definition of related parties is the materially the same under PRC GAAP (specifically, ASBE No. 36 — Disclosure of Affiliated Parties) as per SFAS 57. A translated copy of ASBE 36 is attached as an exhibit hereto.

88. SEC Regulations also require disclosure of re-

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lated party transactions. SEC Regulation S-K ("Reg. S-K") (together with the General Rules and Regulations under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, and the Exchange Act and the forms under these Acts) states the requirements applicable to the content of the non-financial statement portions of the annual reports on form 10-K, quarterly reports on form 10-Q and proxy statements on from 14A. (*See*, Reg. S-K, 17 CFR § 229.10 (2014)).

89. Reg. S-K required, at all times during the Class Period, that the Company "[d]escribe any transaction, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, in which the registrant was or is to be a participant and the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest." 17 CFR § 229.404 (Item 404) (a).

90. Reg. S-K also required the disclosure of detailed information concerning related party transactions exceeding $120,000, including the names of the "related person" or entity participating in the transaction, and the amounts of the transaction. 17 CFR § 229.404 (Item 404) (a)(1-6).

91. A "related person" is defined by Reg. S-K as including any director or executive officer of the Company, any nominee for director, or any immediate family member of a director or executive officer of the registrant, or of any nominee for director or any 5% or greater shareholder. 17 CFR § 229.404 (Item 404(a)(1)(a)).

92. In its May 14, 2009 10-Q, CAGC attached a contract dated December 8, 2008 between CAGC's

subsidiary Pacific Dragon Fertilizer Co., Ltd. and Shenzhen Hongchou in which CAGC's subsidiary promised to purchase 26.9 million RMB ($4.0 million) of raw materials from Shenzhen Hongchou.[21]

93. According to CAGC's 2009 and 2008 Form 10-Ks, CAGC purchased 15% and 14.7% of its raw materials from Shenzhen Hongchou in fiscal 2009 and 2008.

94. CAGC, however, did not disclose that 90% of Shenzhen Hongchou's shares were owned by CAGC CEO, President, Secretary and Chairman defendant Chang and/or that the above purchases were related party transactions.

95. Shenzhen Hongchou's SAIC filings show that Chang has owned 90% of its shares since August 2004, while Ms. Haibo Li owned the remaining 10%.

96. In addition, Haibo Li's sister works for Pacific Dragon, the CAGC subsidiary that signed the related party contract with Shenzhen Hongchou.

97. The SAIC filings also show that Shenzhen Hongchou's annual revenue was only $4,822.00 (RMB 33,269.23) in fiscal 2008, substantially less than CAGC's purported purchases from it.

98. Notably, CAGC reported in the 2009 10-K that "[w]e purchase the majority of our raw materials from suppliers located in the PRC and use suppliers that are located in close proximity to our manufacturing facilities, which helps us to contain our

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[21] China Agritech, Inc., Quarterly Report for Period Ended Mar. 30, 2009, Ex. 10.3 *Industrial Product Purchase Contract No. 090001* (Form 10-Q) (May 14, 2009)

cost of revenue." Shenzhen Hongchou, however, is not close to Pacific Dragon Fertilizer Co., Ltd. or to any of CAGC's subsidiaries. The closest CAGC subsidiary to Shenzhen Hongchou is Anhui Agritech, which is more than 1,300 km (808 miles) away. Pacific Dragon is more than 3,000 km (1,864 miles) from Shenzhen Hongchou.

99. The only reason for CAGC to choose Shenzhen Hongchou as its major supplier is to personally benefit its majority owner, CAGC's CEO, President, Secretary and Chairman of the Board defendant Chang.

## VII. CAGC's Other Suppliers Raise Serious Questions

100. According to CAGC's 2009 10-K, Beijing Zhongxin Chemical Technology Development Co. ("Beijing Zhongxin"), was its largest supplier. CAGC purchased 18% and 13.2% of its raw materials from it in fiscal years 2009 and 2008, respectively. On December 2, 2008, CAGC's subsidiary Pacific Dragon Fertilizer Co., Ltd. signed a contract to purchase 59.6 million RMB ($8.7 million) of raw materials (fulvic acid) from Beijing Zhongxin.[22]

- After extensive government database searches and website searches in all possible transliterated Chinese names, Plaintiffs' investigator could not find such company.[23] Plaintiffs' in-

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[22] *See id., supra*, at n.21.

[23] The LM Report also questioned CAGC's mysterious suppliers because those companies "cannot be found in any directory under possible Chinese names that would correspond to the transliterated names or under the alphabetic names." However,

quiry with a credit agency also found no records of any such company with the Beijing Administration for Industry & Commerce. Plaintiffs believe Beijing Zhongxin does not exist or if it does exist in some form, it is a non-operational shell company.

- If Beijing Zhongxin does exist, it should be an important and well-known player in the market for fertilizer raw materials since it has millions of dollars in annual sales. It is unlikely that CAGC is its only customer.
- Therefore, Plaintiffs' investigator believes that Beijing Zhongxin does not exist and may be a front to siphon funds from CAGC.

101. According to CAGC's 2009 10-K, Harbin Hai Heng Chemical Distribution Co., Ltd., ("Harbin Hai Heng") was its second largest supplier. On December 5, 2008, CAGC's Pacific Dragon subsidiary signed a contract with Harbin Hai Heng to purchase 43.4 million RMB ($6.0 million) of raw materials from Harbin Hai Heng.[24] CAGC purchased 17% and 12% of raw materials from Harbin Hai Heng in fiscal 2009 and 2008, respectively.

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in its response, CAGC still did not disclose the suppliers' Chinese names. It only referred to the link of its SEC filings where only English names were disclosed. It appears Defendants did not disclose the Chinese names because one of the suppliers was owned by CEO/Chairman/President Chang and he did not want to be discovered, while the other supplier does not exist.

[24] *See* China Agritech, Inc., Quarterly Report for Period Ended Mar. 30, 2009, Ex. 10.4 *Industrial Product Purchase Contract No. 090003* (Form 10-Q) (May 14, 2009).

- However, Harbin Hai Heng's PRC SAIC records show that this company did not participate in the mandatory annual inspection for fiscal year 2008 and 2009, implying that it has been a non-active business since 2007. Failing to file the annual inspection will not only bring substantial penalties, but also the risk of revocation of the entity's business license.[25] Without a business license, a company cannot conduct any business in the PRC or even maintain a bank account.
- Harbin Hai Heng is a shell company. According to a credit report issued by Qingdao Inter-Credit Services Pte Co., Ltd. ("Qingdao"), a reputable credit reporting agency in China, Harbin Hai Heng has no known phone number, no website, no information obtainable online and no determinable business operations. These facts have also been verified by Plaintiffs' investigator through extensive database searches.
- Furthermore, Harbin Hai Heng is owned by Guirong Yin who is the mother of Ms. Haibo Li, Chang's business partner in Shenzhen Hongchou, the third largest supplier of CAGC—which was 90% owned by Chang until January 2011 when Chang transferred his 90% interest to Haibo Li. Haibo Li's sister is a branch manager for CAGC subsidiary Pacific Dragon which signed the $4.0 million contract

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[25] *Measures for the Annual Inspection of Enterprises, supra,* at n.6.

with Shenzhen Hongchou. Beyond these entanglements, Defendant CEO Chang's full relationship with the Li family is not yet known.

102. According to CAGC's 2009 10-K, Langfang Tong Chuang Industrial and Trading Company Ltd ("Langfang Tong Chuang") was its fourth largest supplier, and CAGC purchased 13% of its raw materials in 2009 from Langfang Tong Chuang.

- Langfang Tong Chuang's PRC SAIC records show that this company's business scope is limited to "sales of paper, daily grocery, iron powder, construction materials, steel, auto parts, and plastic products and machining." None of CAGC's reported purchases of nitrogen, phosphorus and kalium or any similar chemical material is included within the scope of allowable business operations.
- According to PRC regulations, a company's registered business scope is determined by its Articles and monitored by local authorities. A company is not allowed to conduct any business beyond the registered scope without amendment to its Articles and SAIC registration, unless specifically approved by the SAIC.[26]
- Langfang Tong Chuang's SAIC records do not show any approval for the manufacture, sale or distribution of raw materials for fertilizer.

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[26] Company Law (promulgated by the Standing Comm. Nat'l People's Cong.), arts. 11, 20 (China) *available at* http://ch..na.org.cn/government/207344.htm.

- Furthermore, its SAIC filings show that the company's revenue was $208,370 and $216,350 for the fiscal year 2009 and 2008, respectively,[27] substantially less than CAGC's purported purchase from it.

103. There is no plausible legitimate business explanation for CAGC's payments to Beijing Zhongxin, Harbin Hai Heng and Langfang Tong Chuang as these three purported suppliers clearly did not provide raw materials to CAGC in the amounts reported by CAGC.

104. Furthermore, because operating capital is very scarce in China, it is not the general business practice to provide suppliers with large cash advances. Yet, CAGC made huge cash advances to its suppliers for the future purchase of raw materials. According to CAGC's Form 10-K filed for fiscal year 2009, total cash advances made to its suppliers amounted to $25.35 million in 2009 and $10.8 million in 2008.

## ADDITIONAL FACTS SUPPORTING LIABILITY

### I. *The Audit Committee Charter*

105. According to the Company's audit committee charter adopted on October 22, 2008, members of the audit committee have the responsibility to, among other things:

a. ".... (a) assist the Board's oversight of (i) the integrity of the Company's financial

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[27] Exchange rate for 2008 is RMB 6.9: USD 1, for 2009 is RMB 6.8: USD 1.

reporting process and system of internal controls...";

b. "Review and discuss with management and the independent auditors, before filing with the Securities and Exchange Commission, the annual audited financial statements and quarterly financial statements. Review with the independent auditors and management the results of the audit and the Company's specific disclosures under 'Management's Discussion and Analysis of Financial Condition and Results of Operations.' Discuss matters required to be communicated to Audit Committee in accordance with Statement on Auditing Standards No. 61."; and

c. "With the independent auditors, management and the internal auditors, periodically review and discuss significant (a) financial reporting issues and practices, and critical accounting policies and estimates (b) issues regarding accounting principles and financial statement presentation (including any significant changes in the Company's selection or application of accounting principles) and (c) issues as to the adequacy of the Company's internal control systems and compliance with applicable laws and regulations. Assess management's attitude toward internal controls, the process for establishing and monitoring internal control systems and any special audit steps adopted in light of material control deficiencies."

106. According to CAGC's 2009 10-K, the audit committee was comprised of Defendant Bennett, Dai and Zhang, with Bennett serving as the Chairman. Bennett was also determined by the board of directors to be the necessary audit committee member that qualifies as an "audit committee financial expert."

107. Defendant Bennett, Dai and Zhang as members of the audit committee had an affirmative duty of oversight and responsibility for the integrity of CAGC's financial reporting.

## II. ***CAGC's Code of Ethics Acknowledges Related Party Transactions Should be Avoided***

108. The Company's Code of Ethics, adopted by the Company on April 12, 2006—which CAGC's officers and directors presumably promised to adhere to, and which CAGC's 2006 10-KSB provides applies to its CEO, CFO, Controller and "any person who may perform similar functions" - prohibits self-dealing transaction such as those engaged in by defendant CEO Chang:

The chief executive officer, chief financial officer, comptroller, chief accounting officer or persons performing similar functions (collectively, "Senior Financial Officers") hold an important and elevated role in corporate governance. Senior Financial Officers fulfill this responsibility by prescribing and enforcing the policies and procedures employed in the operation of the enterprise's financial organization, and by demonstrating the following:

I. Honest and Ethical Conduct

Senior Financial Officers will exhibit and promote the highest standards of honest and ethical conduct through the establishment and operation of policies and procedures that:

- **Prohibit and eliminate the appearance or occurrence of conflicts between what is in the best interest of the enterprise and what could result in material personal gain for a member of the financial organization, including Senior Financial Officers.**

CAGC Form 10-KSB, filed April 14, 2009, Exhibit 10.14 (emphasis added).

III. ***Respondeat Superior Liability***

109. CAGC is liable for the acts of the Individual Defendants and its employees under the doctrine of *respondeat superior* and common law principles of agency, as all of the wrongful acts complained of herein were carried out within the scope of their employment with authorization.

110. The *scienter* of the Individual Defendants and other employees and agents of the Company is similarly imputed to CAGC under *respondeat superior* and agency principles.

**THE TRUTH ABOUT CAGC'S FINANCIAL STATEMENTS SLOWLY ENTERED THE MARKET THROUGH PIECEMEAL DISCLOSURES CAUSING THE PRICE OF CAGC STOCK TO DROP**

111. On February 3, 2011, the LM Report published by research firm LM Research, and entitled "China Agritech: A Scam," asserted that China

Agritech was a fraud.[28]

112. The Report asserted that the Company's financial statements were fraudulent due to overstated revenue, and that the Company's factory plants are idle.

113. The adverse news disclosed by the LM Report caused the Company's stock to decline from its closing price of $10.78/share on February 2, 2011 to $9.12/share before closing at $9.85/share on February 3, 2011—a day over day decline of 8.63%.

114. The next day, CAGC vigorously denied the allegations made in the LM report. The response only helped recovery of the stock price by $0.14/share or 1%. Ironically, Charles Law, one of CAGC's Board of Directors, resigned shortly thereafter.

115. CAGC continued to deny the allegations of fraud publicly. Yet, as a result of the allegations of fraud, several analyst firms downgraded CAGC, causing a selloff and declines in its share price.

116. On February 7, 2011, analyst firm Brean Murray downgraded CAGC, and Rodman & Renshaw placed CAGC's rating under review as a result of the allegations of fraud in the LM Report.

117. On February 8, 2011, analyst firm Chardan Capital lowered its price target for CAGC to $5, and based on a lack of credibility in management, rated CAGC a sell.

118. On February 15, 2011 Bronte Capital issued a scathing report presenting additional facts indicat-

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[28] *See* LM Report, *supra*, at n.17.

ing that CAGC was a fraud and could not possibly have produced the revenue it claimed in its financial statements.[29]

119. As a result of the Bronte Capital report, CAGC stock price dropped from $9.81/share on February 7, 2011 to $7.44/share on February 16, 2011—more than 19%—on extremely heavy volume of over 2.8 million shares.

120. A month later, on March 13, 2011,[30] CAGC announced formation of a Special Committee of its Board of Directors ("the Special Committee") to investigate the allegations of fraud made by third parties.[31]

121. The next day CAGC dismissed Ernst & Young Hua Ming as the Company's independent auditor citing the following reasons as disclosed in the 8-K filed on March 18, 2011:

> On November 13, 2010, China Agritech, Inc. (the "Company") appointed Ernst & Young Hua Ming ("E&Y") as its independent registered public accounting firm. On March 14, 2011, the Company terminated the services of E&Y.

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[29] *See* http://brontecapital.blogspot.com/2011/02/china-agritech-chinas-amazing.html.

[30] Given that the last day of active trading prior to CAGC's announcement on Sunday March 13, 2011 regarding potential fraud was Friday March 11, 2011, that is the last day of the Class Period.

[31] *See* China Agritech, Inc., Current Report, Ex. 99.1 *Press Release (Mar. 13, 2011)* (Form 8-K) (Mar. 16, 2011).

> ... On December 15, 2010, E&Y provided a letter to the Audit Committee of the Board of Directors of the Company (the "Audit Committee") describing certain matters that, if not appropriately addressed in a timely manner, may result in audit adjustments, significant deficiencies or material weaknesses and/or delays in meeting the 10-K filing deadline. ... On March 8, 2011, E&Y informed the Audit Committee that it had encountered additional issues and concerns that, in E&Y's view, required additional information and procedures, **including the initiation of an independent investigation, in order to verify certain transactions and balances recorded on the Company's financial statements and records for the year ended December 31, 2010. E&Y also orally advised the Audit Committee that it may not be able to rely on management's representations based on the issues identified.**
>
> * * *
>
> **E&Y informed the Company that the issues identified in performing their audit may, if further investigated, have adverse implications for the financial statements covering the three quarterly reports filed by the Company on Form 10-Q during 2010**, and advised the Audit Committee to inform the predecessor auditors of the issues identified, so that they can assess the impact on prior financial reports.

*See id., supra*, at n.31 (emphases added).

122. Thus, CAGC had concealed that E &Y had

identified serious problems with its financial statements as early as December 15, 2010 and had informed CAGC's board that an internal investigation was necessary.[32] CAGC had misled investors to believe that the investigation was not connected at all with E&Y's audit and concealed that E&Y had demanded the internal investigation as a result of serious issues with CAGC's financial statements. But CAGC failed to correct the problems with the financial statements, failed to provide verification for certain transactions – prompting **"E&Y [to] . . . orally advise[] the Audit Committee that it may not be able to rely on management's representations based on the issues identified."**

123. Thus, the March 14, 2011 press release shocked investors by disclosing that Defendants had concealed that E&Y had insisted that the board commence an investigation and that Defendants had concealed that the failure of CAGC to file its 10-K timely was a result of accounting problems that E&Y had identified back in December 2010—leading to the investigation. Thus, investors learned for the first time that E&Y had identified problems with CAGC's financial statements. This news crushed any remaining credibility CAGC management had because E&Y stated it could not rely on management's representations.

124. Also on March 14, 2011, the Nasdaq delisted and halted trading in CAGC stock with its share price at $6.88/share.

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[32] After retaining a law firm and accounting firm to conduct the investigation, CAGC has still not disclosed the results of the investigation.

125. Then, Defendant Wang, a member of the Company's Board of Directors, as well as a member of the special committee of the Board of Directors, resigned without a word.

126. On May 20, 2011, CAGC stock opened for trading on the pink sheets at $1.50/share having dropped $5.38/share from its previous pre-halt trading price. CAGC shares traded as low as $1.00/share before closing for trading at $3.80/share. The next trading day, CAGC shares dropped another $0.80/share to $3.00/share on heavy trading.

127. The share price decline on May 20 and 23 was a direct result of the negative news concerning E&Y disclosed on March 14, 2011 and the resignation of defendant Wang as a director, who had served as a representative of Carlyle—further eliminating any credibility for CAGC.

128. CAGC shares were valued at $0.16/share as of October 16, 2012.

129. Thus investors have seen the value of their shares drop from $10.78/share on February 2, 2011 when the fraud was first disclosed to $0.16/share as of October 16, 2012—a loss of $10.62/share—almost all of their value.

## ADDITIONAL FACTS SUGGESTIVE OF SCIENTER

### I. Defendants' Stock Sales Demonstrate Scienter

130. Defendants have also profited handsomely from sales of CAGC stock. This demonstrates that defendants had a strong profit motive to inflate the stock price by overstating its financials.

131. CAGC filed a prospectus with the SEC on May 4, 2010 registering large amounts of CAGC stock owned by Defendants for sale. While it is not clear exactly how much stock each Defendant sold pursuant to the Registration Statement, Defendants were each motivated, and intended, to sell CAGC stock and earn tens of millions in profits.

132. Scienter is also supported by fact that CAGC was able to conduct an equity offering to take advantage of CAGC stock's artificially inflated price. In May, 2010, CAGC sold over 1.429 million shares of its stock at $16.10/share raising approximately $23 million; along with the exercise of warrants, CAGC raised an additional $10 million.

133. Defendants Teng, Tang and Zhu all profited handsomely from sales of CAGC stock during the period of the fraud. A list of their specific CAGC share sales are as follows.

134. Defendant Xiaorong Teng, a Director and COO, engaged in the following sales during the Class Period:

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 05/13/10 | 10,000 | $16.94 | $169,400.00 |
| 05/26/10 | 302 | $12.84 | $3,877.68 |
| 05/26/10 | 300 | $12.83 | $3,849.00 |
| 05/26/10 | 99 | $12.82 | $1,269.18 |
| 05/26/10 | 800 | $12.81 | $10,248.00 |
| 05/26/10 | 474 | $12.80 | $6,067.20 |
| 05/26/10 | 1,783 | $12.79 | $22,804.57 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 05/26/10 | 2,019 | $12.78 | $25,802.82 |
| 05/26/10 | 4,223 | $12.77 | $53,927.71 |
| 06/01/10 | 900 | $12.95 | $11,655.00 |
| 06/01/10 | 319 | $12.93 | $4,124.67 |
| 06/01/10 | 2,300 | $12.90 | $29,670.00 |
| 06/01/10 | 300 | $12.89 | $3,867.00 |
| 06/01/10 | 400 | $12.88 | $5,152.00 |
| 06/01/10 | 100 | $12.88 | $1,287.50 |
| 06/01/10 | 2,881 | $12.87 | $37,078.47 |
| 07/23/10 | 1,000 | $12.29 | $12,290.00 |
| 07/23/10 | 400 | $12.28 | $4,912.00 |
| 07/23/10 | 300 | $12.27 | $3,681.00 |
| 07/23/10 | 700 | $12.26 | $8,582.00 |
| 07/23/10 | 1,100 | $12.25 | $13,475.00 |
| 07/23/10 | 900 | $12.24 | $11,016.00 |
| 07/23/10 | 700 | $12.22 | $8,554.00 |
| 07/23/10 | 1,225 | $12.20 | $14,945.00 |
| 07/23/10 | 200 | $12.19 | $2,438.00 |
| 07/23/10 | 475 | $12.18 | $5,785.50 |
| 07/23/10 | 2,400 | $12.17 | $29,208.00 |
| 07/23/10 | 850 | $12.16 | $10,336.00 |
| 07/23/10 | 1,230 | $12.15 | $14,944.50 |
| 07/23/10 | 1,000 | $12.14 | $12,140.00 |
| 07/23/10 | 350 | $12.13 | $4,245.50 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 07/23/10 | 200 | $12.12 | $2,424.00 |
| 07/23/10 | 870 | $12.10 | $10,527.00 |
| 07/23/10 | 300 | $12.08 | $3,624.00 |
| 07/23/10 | 100 | $12.07 | $1,207.00 |
| 07/23/10 | 1,300 | $12.06 | $15,678.00 |
| 07/23/10 | 400 | $12.05 | $4,820.00 |
| 07/23/10 | 200 | $12.04 | $2,408.00 |
| 07/23/10 | 700 | $12.03 | $8,421.00 |
| 07/23/10 | 1,600 | $12.02 | $19,232.00 |
| 07/23/10 | 200 | $12.01 | $2,402.00 |
| 07/23/10 | 1,355 | $12.00 | $16,260.00 |
| 07/23/10 | 300 | $11.99 | $3,597.00 |
| 07/23/10 | 500 | $11.98 | $5,990.00 |
| 07/23/10 | 1,305 | $11.97 | $15,620.85 |
| 07/23/10 | 1,289 | $11.96 | $15,416.44 |
| 07/23/10 | 1,641 | $11.95 | $19,609.95 |
| 07/23/10 | 7,710 | $11.94 | $92,057.40 |
| 07/26/10 | 300 | $12.60 | $3,780.00 |
| 07/26/10 | 500 | $12.59 | $6,295.00 |
| 07/26/10 | 1,400 | $12.58 | $17,612.00 |
| 07/26/10 | 1,200 | $12.57 | $15,084.00 |
| 07/26/10 | 3,900 | $12.56 | $48,984.00 |
| 07/26/10 | 5,100 | $12.55 | $64,005.00 |
| 07/26/10 | 7,600 | $12.54 | $95,304.00 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 01/10/11 | 100 | $12.94 | $1,294.00 |
| 01/11/11 | 258 | $13.03 | $3,361.74 |
| 01/11/11 | 100 | $13.01 | $1,301.00 |
| 01/11/11 | 300 | $12.99 | $3,897.00 |
| 01/11/11 | 100 | $12.98 | $1,298.00 |
| 01/11/11 | 100 | $12.97 | $1,297.00 |
| 01/11/11 | 3,360 | $12.96 | $43,545.60 |
| 01/11/11 | 4,550 | $12.95 | $58,922.50 |
| 01/11/11 | 2,100 | $12.94 | $27,174.00 |
| 01/11/11 | 800 | $12.94 | $10,352.00 |
| 01/12/11 | 300 | $13.06 | $3,918.00 |
| 01/12/11 | 882 | $13.02 | $11,483.64 |
| 01/12/11 | 518 | $13.00 | $6,734.00 |
| 01/12/11 | 6,532 | $12.97 | $84,720.04 |
| **Total** | **100,000 shares** | | **$1,296,290.46** |

135. Defendant Yau-Sing Tang, CAGC's CFO, engaged in the following sales during the Class Period:

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 05/12/10 | 10,000 | $15.30 | $153,000.00 |
| 05/13/10 | 5,000 | $16.60 | $83,000.00 |
| 06/07/10 | 5,000 | $11.38 | $56,921.00 |
| 08/02/10 | 10,000 | $13.00 | $130,000.00 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 08/03/10 | 5,500 | $14.00 | $77,000.00 |
| 08/03/10 | 500 | $14.01 | $7,005.00 |
| 08/03/10 | 200 | $14.09 | $2,818.00 |
| 08/03/10 | 1,900 | $14.10 | $26,790.00 |
| 08/03/10 | 300 | $14.11 | $4,233.00 |
| 08/03/10 | 200 | $14.05 | $2,810.00 |
| 08/03/10 | 800 | $14.02 | $11,216.00 |
| 08/03/10 | 200 | $14.03 | $2,806.00 |
| 08/03/10 | 400 | $14.14 | $5,656.00 |
| 08/06/10 | 850 | $15.16 | $12,886.00 |
| 08/06/10 | 300 | $15.15 | $4,545.00 |
| 08/06/10 | 350 | $15.11 | $5,288.50 |
| 08/06/10 | 200 | $15.12 | $3,024.00 |
| 08/06/10 | 800 | $15.10 | $12,080.00 |
| 08/06/10 | 400 | $15.09 | $6,036.00 |
| 08/06/10 | 300 | $15.04 | $4,512.00 |
| 08/06/10 | 1,600 | $15.03 | $24,048.00 |
| 08/06/10 | 600 | $15.06 | $9,036.00 |
| 08/06/10 | 900 | $15.07 | $13,563.00 |
| 08/06/10 | 500 | $15.05 | $7,525.00 |
| 08/06/10 | 3,200 | $15.00 | $48,000.00 |
| 12/29/10 | 5,000 | $12.50 | $62,500.00 |
| 12/30/10 | 5,000 | $13.00 | $65,000.00 |
| 01/06/11 | 5,000 | $13.50 | $67,500.00 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| **Total** | **65,000 shares** | | **$908,798.50** |

136. Defendant Mingfang Zhu, CAGC's COO, engaged in the following sales during the Class Period:

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 5/18/2010 | 1,830 | $15.60 | $28,548.00 |
| 5/18/2010 | 70 | $15.61 | $1,092.35 |
| 5/19/2010 | 847 | $12.68 | $10,739.96 |
| 5/19/2010 | 100 | $12.65 | $1,265.00 |
| 5/19/2010 | 347 | $12.62 | $4,379.14 |
| 5/19/2010 | 300 | $12.64 | $3,792.00 |
| 5/19/2010 | 353 | $12.63 | $4,458.39 |
| 5/19/2010 | 200 | $12.60 | $2,520.00 |
| 5/19/2010 | 500 | $12.61 | $6,305.00 |
| 5/19/2010 | 700 | $12.72 | $8,904.00 |
| 5/19/2010 | 853 | $12.70 | $10,833.10 |
| 5/19/2010 | 700 | $12.71 | $8,897.00 |
| 5/19/2010 | 500 | $12.74 | $6,370.00 |
| 5/19/2010 | 200 | $12.79 | $2,558.00 |
| 5/19/2010 | 700 | $12.83 | $8,981.00 |
| 5/19/2010 | 700 | $12.78 | $8,946.00 |
| 5/19/2010 | 500 | $12.77 | $6,385.00 |
| 5/19/2010 | 600 | $12.76 | $7,656.00 |
| 5/19/2010 | 400 | $12.69 | $5,076.00 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 5/19/2010 | 700 | $12.66 | $8,862.00 |
| 5/19/2010 | 700 | $12.67 | $8,869.00 |
| 5/19/2010 | 300 | $12.82 | $3,846.00 |
| 5/19/2010 | 250 | $12.81 | $3,202.50 |
| 5/19/2010 | 1,150 | $12.84 | $14,766.00 |
| 5/19/2010 | 1,550 | $12.85 | $19,917.50 |
| 5/19/2010 | 370 | $12.86 | $4,758.20 |
| 5/19/2010 | 500 | $12.90 | $6,450.00 |
| 5/19/2010 | 300 | $12.95 | $3,885.00 |
| 5/19/2010 | 500 | $12.94 | $6,470.00 |
| 5/19/2010 | 400 | $12.91 | $5,164.00 |
| 5/19/2010 | 300 | $12.88 | $3,864.00 |
| 5/19/2010 | 500 | $12.93 | $6,465.00 |
| 5/19/2010 | 400 | $12.96 | $5,184.00 |
| 5/19/2010 | 200 | $12.92 | $2,584.00 |
| 5/19/2010 | 680 | $12.89 | $8,765.20 |
| 5/19/2010 | 800 | $12.80 | $10,240.00 |
| 5/19/2010 | 500 | $13.24 | $6,620.00 |
| 5/19/2010 | 200 | $13.26 | $2,652.00 |
| 5/19/2010 | 300 | $13.25 | $3,975.00 |
| 5/19/2010 | 800 | $13.22 | $10,576.00 |
| 5/19/2010 | 500 | $13.29 | $6,645.00 |
| 5/19/2010 | 1,600 | $13.19 | $21,104.00 |
| 5/19/2010 | 1,900 | $13.18 | $25,042.00 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 5/19/2010 | 1,250 | $13.13 | $16,412.50 |
| 5/19/2010 | 450 | $13.06 | $5,877.00 |
| 5/19/2010 | 200 | $13.09 | $2,618.00 |
| 5/19/2010 | 700 | $13.10 | $9,170.00 |
| 5/19/2010 | 500 | $13.07 | $6,535.00 |
| 5/19/2010 | 300 | $13.08 | $3,924.00 |
| 5/19/2010 | 300 | $13.15 | $3,945.00 |
| 5/19/2010 | 200 | $13.16 | $2,632.00 |
| 5/19/2010 | 100 | $13.11 | $1,311.00 |
| 5/19/2010 | 100 | $13.17 | $1,317.00 |
| 5/19/2010 | 100 | $13.20 | $1,320.00 |
| 5/27/2010 | 13,182 | $13.00 | $171,366.00 |
| 5/27/2010 | 1,718 | $13.01 | $22,351.18 |
| 5/27/2010 | 1,251 | $13.03 | $16,300.53 |
| 5/27/2010 | 2,049 | $13.04 | $26,718.96 |
| 5/27/2010 | 900 | $13.02 | $11,718.00 |
| 5/27/2010 | 100 | $13.08 | $1,308.00 |
| 5/27/2010 | 300 | $13.05 | $3,915.00 |
| 5/27/2010 | 100 | $13.06 | $1,305.50 |
| 5/27/2010 | 100 | $13.07 | $1,307.00 |
| 5/27/2010 | 300 | $13.06 | $3,918.00 |
| 6/4/2010 | 13,486 | $12.00 | $161,832.00 |
| 6/4/2010 | 1,200 | $12.01 | $14,412.00 |
| 6/4/2010 | 1,214 | $12.02 | $14,592.28 |

| Date | # Shares | Price/Share | Proceeds |
|---|---|---|---|
| 6/4/2010 | 300 | $12.04 | $3,612.00 |
| 6/4/2010 | 100 | $12.05 | $1,205.00 |
| 6/4/2010 | 1,800 | $12.03 | $21,654.00 |
| 6/4/2010 | 100 | $12.02 | $1,201.50 |
| 6/4/2010 | 100 | $12.11 | $1,211.00 |
| 6/4/2010 | 1,700 | $12.10 | $20,570.00 |
| **Total** | **70,000 shares** | | **$893,171.79** |

## II. CAGC's Misconduct Was So Serious that NASDAQ Delisted and the Company's Securities from Trading And the SEC Revokes CAGC's Registration

137. CAGC's misconduct was evidently serious enough that on April 12, 2011, it received a letter from NASDAQ stating that:[33]

- "the staff of Nasdaq believes that the continued listing of the Company's securities on Nasdaq is no longer warranted based on public interest concerns and the Company's failure to file its 2010 Form 10-K on time (the 'Nasdaq Letter')."
- "the staff of Nasdaq believes **that the serious concerns raised by our former auditors, Ernst & Young Hua Ming ("E&Y"), relat-**

[33] CACG disclosed the letter in its 8-K filed with the SEC on April 18, 2011. *See* China Agritech, Inc., Current Report (Form 8-K) (Apr. 18, 2011) (emphasis added).

**ing to issues surfacing in the audit process rise to the level of a public interest concern . . . ."**

138. On October 17, 2012 the SEC issued an order revoking the registration of CAGC's common stock "for the protection of investors."[34]

## III. The Revolving Door for CAGC's Auditors

139. CAGC has changed auditors four times in three years. Since 2008, the Company has had four independent auditors.

140. Kabani & Company, Inc., ("Kabani") a Los Angeles-based accountancy firm, audited the Company's 2007 financials. Kabani was the accountancy that audited the notoriously fraudulent Bodisen Biotech, an organic fertilizer company that was delisted in 2007,[35] and China Green Agriculture (CGA), a firm which was also disclosed having falsely reported its results to U.S. investors.[36]

141. Effective April 18, 2008, CAGC terminated Kabani and retained Grobstein, Horwath & Company LLP (later renamed Crowe Horwath LLP) as its

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[34] *See* China Agritech, Inc., Exchange Act Release No. 68060, 2012 SEC LEXIS 3277, 2012 WL 4909381 (Comm'n Sec. Oct. 17, 2012).

[35] *See* Bodisen Biotech, Inc., Notification Removal from Listing or Reg. Under Section 12(b) of the Exchange Act (Form 25-NSE & Attachment) (Apr. 24, 2007).

[36] *See* China Green Agriculture, http://www.cgagri.com/investor/investor5-1.htm (last visited June 23, 2014).

auditor.[37] CAGC then terminated Crowe Horwath and retained E&Y in November, 2010.[38]

142. However, CAGC fired E&Y four months later on March 14, 2011 after E&Y identified issues in the 2009 audit, and stated it could no longer rely on representations of CAGC management.[39]

143. On April 12, 2011, CAGC announced it had hired Simon & Edward LLP as its new independent auditor to replace E&Y.[40] Still, CAGC has not produced audited financial statements for fiscal year 2010.

## IV. The SEC has Warned of Reverse Merger Companies Such as CAGC

144. Chinese reverse mergers ("CRMs") have been a magnet for disreputable stock promoters, leading the SEC to issue warnings about investing in companies like CAGC.

145. Shielded by the geographic distance of thousands of miles and operating under a regulatory CRM reverse merger companies have few incentives to provide complete and accurate disclosures to American investors. An August 28, 2010 article in *Barron's* by Bill Alpert and Leslie P. Norton entitled,

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[37] *See* China Agritech, Inc., Current Report, Item 4.01, Ex. 99.1 (Form 8-K) (Apr. 24, 2008).

[38] *See* China Agritech, Inc ., Current Report, Item 4.01, Ex. 99.1 (Form 8-K) (Nov. 17, 2010).

[39] *See* China Agritech, Inc. , Current Report, Items 4.01, 5.02, 8.01, Exs. 16.1, 99.1 (Form 8-K) (Mar. 18, 2011).

[40] *See* China Agritech, Inc ., Current Report, Item 4.01, Ex. 99.1 (Form 8-K) (Apr. 12, 2011).

"Beware This Chinese Export," discusses the enforcement problems that American regulators face when dealing with Chinese companies that trade on U.S. exchanges through CRMs. The article states that "[t]he SEC's enforcement staff can't subpoena evidence of any fraudulent activities in China, and Chinese regulators have little incentive to monitor shares sold only in the U.S."

146. U.S. regulators have finally begun to take notice of the manipulation and fraud endemic in CRMs. The SEC has established a task force to investigate investors' claims regarding the impropriety and fraud of CRMs trading on the U.S. markets. SEC Commissioner Luis A. Aguilar (the "Commissioner") discussed Chinese reverse mergers and the process of "backdoor registration," stating:[41]

> In the world of backdoor registrations to gain entry into the U.S. public market, the use by Chinese companies has raised some unique issues, even compared to mergers by U.S. companies. Two important ones are:
>
> - First, there appear to be **systematic concerns with the quality of the auditing and financial reporting**; and
> - Second, even though these companies are registered here in the U.S., there **are limitations on the ability to enforce the securities laws, and for investors to**

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[41] Luis A. Aguilar, SEC Comm' r, Facilitation Real Capital Formation, Address Before the Council of Institutional Investors Spring Meeting (Apr. 4, 2011) *in* Wash. D.C. *available at* http://www.sec.gov/news/speech/2011/spch040411laa.htm.

> **recover their losses when disclosures are found to be untrue, or even fraudulent.**
>
> **I am worried by the systematic concerns surrounding the quality of the financial reporting by these companies.** In particular, according to a recent report by the staff of the Public Company Accounting Oversight Board (PCAOB), U.S. auditing firms may be issuing audit opinions on the financials, but not engaging in any of their own work. Instead, the U.S. firm may be issuing an opinion based almost entirely on work performed by Chinese audit firms. If this is true, it could appear that the U.S. audit firms are simply selling their name and PCAOB-registered status because they are not engaging in independent activity to confirm that the work they are relying on is of high quality. This is significant for a lot of reasons, including that the PCAOB has been prevented from inspecting audit firms in China.

*Id.* (emphasis added).

147. On June 9, 2011, the SEC issued an Investor Bulletin on Risks of Investing in Reverse Merger Companies, warning investors about investing in companies that enter U.S. markets through CRM because "...there have been instances of fraud and other abuses involving reverse merger companies." The Bulletin specified that "[g]iven the potential risks, investors should be especially careful when considering investing in the stock of reverse merger companies," said Lori J. Schock, Director of the

SEC's Office of Investor Education and Advocacy.[42]

**PLAINTIFFS' CLASS ACTION ALLEGATIONS**

148. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of a Class consisting of all persons who purchased the common stock of CAGC during the Class Period and who were damaged thereby. Excluded from the Class are Defendants, the present and former officers and directors of CAGC and any subsidiary thereof, members of any defendants' immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

149. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, CAGC's stock was actively traded on the NASDAQ at all times during the Class Period.

150. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are at least hundreds, if not thousands, of members in the proposed Class, particularly given the size of CAGC's public float as set forth in CAGC's public SEC filings, which for example was 13,051,808 on July 16, 2010. Members of the Class may be identified from records maintained by CAGC or its transfer agent and may be notified of the pendency of this action by mail, using a form of notice

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[42] *See* Press Release, SEC, SEC Issues Bulletin on Risks of Investing in Reverse Merger Companies (June 9, 2011) *available at* http://www.sec.gov/news/press/2011/2011-123.htm.

customarily used in securities class actions.

151. Plaintiffs' claims are typical of the claims of the members of the Class, as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

152. Plaintiffs will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation.

153. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether the federal securities laws were violated by Defendants' acts as alleged herein;

b. whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the business, and financial performance of CAGC; and

c. to what extent the members of the Class have sustained damages and the proper measure of damages.

154. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litiga-

tion make it impossible for members of the Class to redress individually the wrongs done to them. There will be no difficulty in the management of this action as a class action.

**RELIANCE IS PRESUMED UNDER FRAUD ON THE MARKET**

155. Plaintiffs are permitted a presumption of reliance because CAGC stock was traded in an efficient market during the Class Period. At all relevant times, the market for CAGC common stock was an efficient market for the following reasons, among others:

a. CAGC stock met the requirements for listing, and was listed and actively traded on the on the NASDAQ market (under ticker symbol "CAGC"), a highly efficient and automated market;

b. As stated in the SEC filing DEF 14A dated July 22, 2010, in the section captioned "Security Ownership of Certain Beneficial Owners and Management," on July 16, 2010, there were 20,766,243 shares of Common Stock outstanding. Of these shares, a total of 7,724,435 are attributed to officers and directors. The public float (shares not held by reported insiders) were 13,051,808 at that date;

c. During the class period, the weekly average number shares traded (split-adjusted) was 4.4 million. Approximately 33.7% of the public float, and 21.2% of all outstanding shares, were bought and sold on a

weekly basis, demonstrating a very strong presumption of an efficient market;

d. As a regulated issuer CAGC filed with the SEC periodic public reports and was eligible (and did file) S-3 registration statements with the SEC during the Class Period (February 9, 2010, May 12, 2010, April 16, 2010, and October 19, 2010);

e. CAGC conducted a $23 million offering of shares during the Class Period, which attracted media coverage and investor interest;

f. CAGC regularly communicated with public investors via established market communication mechanisms, including regular disseminations of press releases on the national circuits of major newswire services and other wide-ranging public disclosures, such as communications with the financial press and other similar reporting service;

g. There were more than 2,100 news stories, and analyst reports, and other media coverage regarding CAGC during the Class Period;

h. CAGC was followed by several securities analysts employed by major brokerage firms including Brean Murray, Rodman and Renshaw, LM Research, Bronte Capital, and Chardan Capital (among others), who wrote reports that were distributed to the sales force and certain customers of their respective brokerage firms during the

Class Period. There were at least 125 investment reports published by analysts and others during the Class Period, which disseminated information about CAGC to investors;

i. On average 28 NASD member firms were active market-makers in CAGC stock at all times during the Class Period;

j. Unexpected material news about CAGC was rapidly reflected in and incorporated into the Company's stock price during the Class Period; and

k. There is a strong statistically significant cause and effect relationship between the release of new company specific information and changes in CAGC's stock price. For example:

- On December 23, 2009, CAGC disclosed that it had achieved its 2009 sales target of 80,000 metric tons of organic granular fertilizer. This positive news caused an increase in CAGC's stock price of $2.12/share (adjusted for the two-for-one stock split effective February 10, 2010). The CAGC stock-price increase was statistically significant at the 99% confidence level.

- On February 8, 2010, CAGC released FY10 revenue guidance of approximately $114M vs. consensus estimates of $69.46M. This positive news caused an increase of CAGC's stock price of

$1.20/share (adjusted for the two-for-one stock split effective February 10, 2010). The CAGC stock-price increase was statistically significant at the 95% confidence level.

- On August 12, 2010, CAGC announced earnings per share for the second quarter 2010 that exceeded the analyst consensus estimate. This positive news caused an increase of CAGC's stock price of $2.97/share. The CAGC stock-price increase was statistically significant at the 99% confidence level.
- On September 8, 2010, an analyst at Chardan Capital Markets downgraded shares of CAGC from Neutral to Sell. This negative news caused a decrease of CAGC's stock price of $2.59/share. CAGC's stock-price decrease was statistically significant at the 99% confidence level.
- On November 10, 2010, CAGC announced earnings per share that missed the analyst consensus estimate. This negative news caused CAGC's stock price to decrease $3.26/share. CAGC's stock-price decrease was statistically significant at the 99% confidence level.

**AFFILIATED UTE**

156. With respect to Defendants' failure to disclose material related party transactions, Plaintiffs are permitted a presumption of reliance under the

U.S. Supreme Court's decision in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered the omitted related party transactions important in deciding whether to purchase CAGC stock.

157. Here, Plaintiffs need not prove that they relied on Defendants' material omission of the related party transactions in purchasing CAGC stock, because under *Affiliated Ute*, the related party transactions are material facts, and therefore, Plaintiffs are entitled to a presumption of reliance.

## FIRST CAUSE OF ACTION

### For Violations of Section 10(b) of The Exchange Act and Rule 10b-5 Promulgated Thereunder (On Behalf of Plaintiffs and the Proposed Class and Against All Defendants)

158. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

159. This first cause of action is asserted on behalf of Plaintiffs and the Proposed Class against all Defendants.

160. During the Class Period, Defendants carried out a plan, scheme and course of conduct which was intended to, and throughout the Class Period, did: (1) deceive the investing public, including Plaintiffs and other Class members, as alleged herein; and (2) cause Plaintiffs and other members of the Class to purchase and/or sell CAGC's securities at artificially inflated and distorted prices. In furtherance of

this unlawful scheme, plan and course of conduct, Defendants, individually and as a group, took the actions set forth herein.

161. Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business, operations and future prospects of CAGC as specified herein.

162. Defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of CAGC' s value and performance and continued substantial growth, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about CAGC and its business operations and financial condition in light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business that operated as a fraud and deceit upon the purchasers CAGC securities during the Class Period.

163. Each of the Defendants' primary liability, and controlling person liability, arises from the following: (a) defendants were high-level executives, directors, and/or agents at the Company during the Class Period and members of the Company's management team or had control thereof; (b) by virtue of

their responsibilities and activities as senior officers and/or directors of the Company, were privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; (c) Defendants enjoyed significant personal contact and familiarity with the other members of the Company's management team, internal reports and other data and information about the Company's finances, operations, and (d) Defendants were aware of the Company's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

164. Defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such Defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing CAGC's financial condition from the investing public and supporting the artificially inflated price of its securities. As demonstrated by Defendants' false and misleading statements during the Class Period, Defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by failing to take steps necessary to discover whether those statements were false or misleading.

165. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price for CAGC's securities was artificially in-

flated during the Class Period.

166. In ignorance of the fact that market prices of CAGC's publicly-traded securities were artificially inflated or distorted, and relying directly or indirectly on the false and misleading statements made by defendants, or upon the integrity of the market in which the Company's securities trade, and/or on the absence of material adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, Plaintiffs and the other members of the Class acquired CAGC's securities during the Class Period at artificially high prices and were damaged thereby.

167. At the time of said misrepresentations and omissions, Plaintiffs and other members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiffs and the other members of the Class and the marketplace known the truth regarding CAGC's financial results and condition, which were not disclosed by defendants, Plaintiffs and other members of the Class would not have purchased or otherwise acquired CAGC securities, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices or distorted prices at which they did.

168. By virtue of the foregoing, the Defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

169. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiffs and the other members of the Class suffered damages in connection with their respective purchases and sales of the

Company's securities during the Class Period.

170. This action was filed within two years of discovery of the fraud and within five years of Plaintiffs' purchases of securities giving rise to the cause of action.

## SECOND CAUSE OF ACTION

**For Violation of Section 20(a) of The Exchange Act (On Behalf of Plaintiffs and the Proposed Class and Against the Individual Defendants)**

171. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

172. This Second Claim is asserted against each of the Individual Defendants.

173. The Individual Defendants, acted as controlling persons of CAGC within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, agency, and their ownership and contractual rights, participation in and/or awareness of the Company's operations and/or intimate knowledge of aspects of the Company's revenues and earnings and dissemination of information to the investing public, the Individual Defendants had the power to influence and control, and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements that Plaintiffs contend are false and misleading. The Individual Defendants were provided with or had unlimited accessto copies of the Company's reports, press releases, public filings and other statements alleged by Plaintiffs to be misleading prior to

and/or shortly after these statements were issued, and had the ability to prevent the issuance of the statements or to cause the statements to be corrected.

174. In particular, each of these Defendants had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

175. As set forth above, CAGC and the Individual Defendants each violated Section 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint.

176. By virtue of their positions as controlling persons, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act as they culpably participated in the fraud alleged herein. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs and other members of the Class suffered damages in connection with their purchases of the Company's common stock during the Class Period.

177. This action was filed within two years of discovery of the fraud and within five years of Plaintiffs' purchases of securities giving rise to the cause of action.

## PRAYER FOR RELIEF

**WHEREFORE**, Plaintiffs prays for relief and judgment, as follows:

a. Determining that this action is a proper class action and certifying Plaintiffs as a class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as Class Counsel;

b. Awarding compensatory damages in favor of Plaintiffs and the other Class members against all Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

c. Awarding Plaintiffs and the Proposed Class their reasonable attorneys' fees, costs and expenses incurred in this action; and

d. Such other and further relief as the Court may deem just and proper.

Dated: September 4, 2014

**WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP**

By: */s/ Betsy C. Manifold*

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**JURY TRIAL DEMANDED**

Plaintiffs hereby demand a trial by jury.

Dated: September 4, 2014

**WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP**

By: */s/ Betsy C. Manifold*
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*Attorneys for Plaintiffs and the [Proposed] Class*

## APPENDIX D

### *Dean* Amended Complaint

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| THEODORE DEAN, SLAVA VANOUS, CLAIR HARPSTER, RANDOLPH DANIELS-KOLIN AND TAN TEE YONG INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,<br><br>Plaintiffs,<br><br>vs.<br><br>CHINA AGRITECH, INC., YU CHANG, YAU-SING TANG, GENE MICHAEL BENNETT, XIAO RONG TENG, MING FANG ZHU, ZHENG "ANNE" WANG, CHARLES LAW, LUN ZHANG DAI, HAI LIN ZHANG, RODMAN & RENSHAW, LLP AND CROWE HORWATH LLP, | CASE No.: 11-CV-01331 (RGK) (PJWx)<br><br>AMENDED COMPLAINT<br><br>CLASS ACTION<br><br>**JURY TRIAL DEMANDED** |

Defendants.

1. Plaintiffs Theodore Dean, Slava Various, Clair Harpster, Randolph Daniels-Kolin and Tan Tee Yong ("Plaintiffs") individually and on behalf of all other persons similarly situated, by their undersigned attorneys, allege in this Amended Complaint (the "Complaint") the following upon knowledge with respect to their own acts, and upon facts obtained through an investigation conducted by their counsel, which included, *inter alia*: (a) review and analysis of relevant filings made by China Agritech, Inc. ("CAGC" or the "Company") with the United States Securities and Exchange Commission (the "SEC"); (b) review and analysis of defendants' public documents, conference calls and press releases; (c) review and analysis of securities analysts' reports and advisories concerning the Company; (d) information readily obtainable on the Internet; (e) interviews of several witnesses with personal knowledge of the relevant facts; (f) investigation of Chinese State Administration of Industry and Commerce ("SAIC") filings; (g) investigation of Chinese State Administration of Taxation ("SAT") filings; and (h) investigation and analysis of companies alleged to be suppliers of the Company.

## I. NATURE OF THE ACTION

2. This is a class action on behalf of a class consisting of all persons and entities, other than defendants and their affiliates, who purchased the publicly traded common stock of CAGC between November 12, 2009 through March 11, 2011 (the "Class Period"), seeking to recover damages caused by defend-

ants' violations of federal securities laws (the "Class.").

3. This Complaint alleges claims for violations of §10(b) and §20(a) of the Securities Exchange Act of 1934 on behalf of all Class members. No §10(b) or §20(a) claims are asserted against defendants Rodman & Renshaw or Crowe Horwath.

4. This Complaint also alleges claims under §11 and §15 of the Securities Act of 1933 on behalf of all Class members that purchased shares of CAGC in or pursuant to CAGC's secondary public offering of common stock on approximately May 4, 2010 at $16.10/share.

5. CAGC is a holding company. Its business operations are primarily conducted through its direct and indirect subsidiaries in the People's Republic of China ("PRC"). It purports to manufacture and sell organic compound fertilizers and related agricultural products.

6. During the Class Period, CAGC and its officers and directors engaged in a wide-ranging fraud including:

- Overstating revenue by at least 900% for fiscal 2009 and 1,444% for fiscal 2008.
- Reporting $76.13 million of revenue in 2009 and $45.24 million in 2008, when the true revenue figures were not more than $7.6 million in 2009 and $3.0 million in 2008.
- Overstating net income by at least 536% for fiscal 2009. Reporting a profit for fiscal

2008, while the Company was in fact losing money.

- Reporting $6.17 million of net income in 2009 and $9.83 million in 2008, when the true net income figures were not more than $0.97 million in 2009 and a net loss of ($1.88) million in 2008.
- Failing to disclose material related party transactions - CAGC signed a contract effective December 8, 2008 to pay a company controlled by its CEO Chang approximately $4.0 million for raw materials.
- CAGC has maintained two materially different sets of financial accounts, one for investors that it files with the SEC and one for its true business operations that it provides to the Chinese government showing revenue and income only a tiny fraction of that reported to the SEC and investors.

7. During the Class period when CAGC was issuing false and misleading financial statements, Defendants Teng, Tang and Zhu sold over $3.0 million of CAGC stock and CAGC sold over $20.0 million in a public offering.

8. Then on March 14, 2011, CAGC's auditors Ernst & Young Hua Ming ("E & Y") stated that they are not able to rely on management's representations any longer.

9. The same day E &Y's role as auditor was terminated, Nasdaq delisted and halted trading in CAGC's stock "in order to protect the public interest."

10. In the wake of the scandal, two of CAGC's directors and its COO have resigned.

11. As of the date of this amended complaint, CAGC still has not filed its annual report for 2010 on Form10-K with the SEC, which was originally due on April 15, 2011.

12. CAGC's false statements have caused investors substantial losses as its shares have dropped from $10.78/share to $1.55/share as a result of defendants' violations of the securities laws.

## II. JURISDICTION AND VENUE

13. The Securities Exchange Act claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. § 78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

14. The Securities Act claims asserted herein arise under and pursuant to Sections 11, 12(a)(2) and 15 of the Securities Act (15 U.S.C. §§ 77k, 771 and 77(o)).

15. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa), Section 22(a) of the Securities Act, 15 U.S.C. §77v(a), and 28 U.S.C. § 1331.

16. Venue is proper in this Judicial District pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa), 28 U.S.C. § 1391(b), 28 U.S.C. § 1391(d), and Section 22(a) of the Securities Act (15 U.S.C. §77v(a)).

17. In connection with the acts, conduct and other

wrongs alleged herein, Defendants either directly or indirectly used the means and instrumentalities of interstate commerce, including but not limited to the United States mails, interstate telephone communications and the facilities of the national securities exchange.

## III. PARTIES

18. Plaintiffs Theodore Dean, Tan Tee Yong, Slava Vanous, Clair Harpster, and Randolph Daniels-Kolin purchased CAGC common stock during the Class Period and have suffered damages as a result. Tan Tee Yong's PSLRA Certification is attached hereto. The PSLRA Certifications of the other plaintiffs have previously been filed with the Court and are incorporated herein by reference.

19. Defendant CAGC is a Delaware corporation with its principal executive offices located at Room 3F, No. 11 Building, Zhonghong International Business Garden, Future Business Center, Chaoyang North Road, Chaoyang District, Beijing, China 100024. A CAGC subsidiary maintains an office in California.

20. CAGC, through its subsidiaries, purports to manufacture and sell organic compound fertilizers and related agricultural products in the PRC.

21. To have its stock publicly traded in the United States, CAGC employed a device called a "reverse merger" in 2005. In a reverse merger, a publicly traded shell company acquires the private company seeking to go public. In exchange, the shareholders of the former private company receive a controlling share of the public company.

22. As a result of the reverse merger, CAGC became a holding company that primarily operates through its subsidiaries in the PRC.

23. Defendant Yu Chang ("Chang") was and is the Company's CEO, President, Secretary and Chairman of the Board at all relevant times. In addition, Defendant Chang was a substantial shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and 2009 10-K, Defendant Chang owned 41.96% and 40.23% of the Company's stock, respectively.

24. Defendant Yau-Sing Tang ("Tang") was and is the Company's CFO and Controller from October 2008 through the present. In addition, Defendant Tang was a shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and 2009 10-K, Defendant Tang owned 1.04% and 0.4% of the Company's stock, respectively.

25. Defendant Gene Michael Bennett ("Bennett") was and is a director of CAGC from October 2008 through the present. At all times during the Class Period, Bennett was the chair of CAGC's audit committee, as well as a member of CAGC's Nominating and Governance Committee. After the CAGC Defendants' fraud was disclosed, Bennett was the head of the Company's Special Committee investigating the allegations of fraud.

26. Defendant Xiao Rong Teng ("Teng") was and is a director of CAGC at all relevant times. Teng also served as the Company's COO from February 2005 to March 2009. In addition, Teng was a substantial shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and

2009 10K, Teng owned 2.53% and 2.15% of the Company's stock, respectively.

27. Defendant Ming Fang Zhu ("Zhu") was and is CAGC's Chief Operating Officer from March 2009. From April 2007 to March 2009, Zhu served as President of Beijing Agritech Fertilizer Co, Ltd., an indirect subsidiary of the Company.

28. Defendant Lun Zhang Dai ("Dai") was and is a director of CAGC at all relevant times. Dai also serves as a member of the Company's Audit Committee, Compensation Committee and Nominating and Governance Committee.

29. Defendant Hai Lin Zhang ("Zhang") was and is a director of CAGC from October 2008. Zhang also serves as a member of the Company's Audit Committee, Compensation Committee and Nominating and Governance Committee.

30. Defendant Charles Law ("Law") was a director of CAGC from January, 2010. According to the Company's SEC filings, Law is a qualified U.S. attorney who has an understanding of SEC compliance requirements.

31. Defendant Zheng "Anne" Wang ("Wang") was a director of CAGC from December 2009. Wang has been Vice-President of Carlyle Asia Growth Capital, a subsidiary of the Carlyle Group ("Carlyle"), since December 2007. According to the Company's SEC filings, Wang was Carlyle's designee to CAGC's board and was determined by the Board of Directors not to be an "independent director."

32. Chang, Tang, Bennett, Teng, Zhu, Dai, Zhang, Law, Wang are collectively referred to here-

inafter as the "Individual Defendants."

33. Rodman & Renshaw, LLC ("Rodman") is a broker-dealer who served as the underwriter of a secondary public offering of $20.0 million of CAGC stock that was completed on or about May 4, 2010 (the "Offering"). As the underwriter for the Offering Rodman was obligated to conduct due diligence to ensure that CAGC and its business was as presented to investors in the Registration Statement and Prospectus for the Offering. Rodman was negligent in conducting due diligence on CAGC for the Offering.

34. Crowe Horwath LLP ("Crowe") served as CAGC's independent auditors and certified the accuracy of CAGC's financial statements for fiscal years 2008 and 2009. Crowe consented to including its certification of CAGC's financial statements in the Registration Statement and Prospectus for the Offering. Crowe was negligent in certifying CAGC's fiscal 2008 and 2009 financial statements as accurate, and permitting them to be included in the Registration Statement and Prospectus when CAGC's fmancial statements were in fact materially misstated.

35. No allegations of fraud are alleged against Rodman or Crowe. Plaintiffs do not intend any part of this Complaint to allege that Rodman or Crowe acted with fraudulent intent or that they committed fraud.

**The Audit Committee**

36. According to the Company's audit committee charter, members of the audit committee have the responsibility to, among other things:

a. ".... (a) assists the Board's oversight of (i) the integrity of the Company's financial reporting process and system of internal controls...";

b. "Review and discuss with management and the independent auditors, before filing with the Securities and Exchange Commission, the annual audited financial statements and quarterly financial statements. Review with the independent auditors and management the results of the audit and the Company's specific disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations.- Discuss matters required to be communicated to Audit Committee in accordance with Statement on Auditing Standards No. 61."; and

c. "With the independent auditors, management and the internal auditors, periodically review and discuss significant (a) financial reporting issues and practices, and critical accounting policies and estimates. (b) issues regarding accounting principles and financial statement presentation (including any significant changes in the Company's selection or application of accounting principles). and (c) issues as to the adequacy of the Company's internal control systems and compliance with applicable laws and regulations. Assess management's attitude toward internal controls, the process for establishing and monitoring internal control systems and any

> special audit steps adopted in light of material control deficiencies."

37. According to CAGC's 2009 10-K, the audit committee was comprised of Defendant Bennett, Dai and Zhang, with Bennett serving as the Chairman. Bennett was also determined by the board of directors to be the necessary audit committee member that qualifies as an "audit committee fmancial expert".

38. Defendant Bennett, Dai and Zhang as members of the audit committee had an affirmative duty of oversight and responsibility for the integrity of CAGC's financial reporting.

**CAGC's Code of Ethics Acknowledges Related Party Transactions Should be Avoided**

39. The Company's Code of Ethics — which CAGC's officers and directors presumably promised to adhere to - prohibits self-dealing transaction such as those engaged in by defendant CEO Chang:

> "The chief executive officer, chief financial officer, comptroller, chief accounting officer or persons performing similar functions (collectively, "Senior Financial Officers") hold an important and elevated role in corporate governance. Senior Financial Officers fulfill this responsibility by prescribing and enforcing the policies and procedures employed in the operation of the enterprise's financial organization, and by demonstrating the following:

> I. Honest and Ethical Conduct Senior Financial Officers will exhibit and promote the highest standards of honest and ethical conduct through the establishment and operation of policies and procedures that:
>
> ***
>
> • **Prohibit and eliminate the appearance or occurrence of conflicts between what is in the best interest of the enterprise and what could result in material personal gain fora member of the financial organization, including Senior Financial Officers."**

[Emphasis added.]

**Respondeat Superior Liability**

40. CAGC is liable for the acts of the Individual Defendants and its employees under the doctrine of *respondeat superior* and common law principles of agency, as all of the wrongful acts complained of herein were carried out within the scope of their employment with authorization.

41. The *scienter* of the Individual Defendants and other employees and agents of the Company is similarly imputed to CAGC under *respondeat superior* and agency principles.

## IV. DEFENDANTS' MATERIAL OMMISSIONS AND MISREPRESENTATIONS

### A. The 2009 Q3 10-Q is False and Materially Misstated

42. The Class period begins on November 12, 2009 when the Company filed with the SEC its report for the third quarter of 2009 on Form 10-Q ("2009 Q3 10-Q") containing false and misleading financial statements.

43. The false and misleading 10-Q was signed by defendants Chang and Tang. Chang and Tang also signed the accompanying Sarbanes-Oxley ("SOX") certifications, attesting to the accuracy of CAGC's financial statements.

44. The 2009 Q3 10-Q was false because it materially misstated CAGC's revenue and net income for the quarter.

45. According to CAGC's SEC filings, in 2009 CAGC had four operating subsidiaries located in the PRC: Beijing Agritech, Pacific Dragon, Anhui Agritech, and Xinjiang Agritech.

46. Plaintiffs' counsel obtained financial statements filed by the four subsidiaries with both the PRC State Administration for Industry and Commerce ("SAIC")[1] and PRC State Administration of

[1] The SAIC (State Administration for Industry and Commerce) is the Chinese government body that regulates industry and commerce in China. It is primarily responsible for business registrations, issuing and renewing business licenses and acts as the government supervisor of corporations. All Chinese companies are required to file financial statements with the Chinese government annually or bi-annually.

Taxation ("SAT")[2].

47. The consolidated financials reported by CAGC with the SAIC and SAT for *entire fiscal year* 2009 are substantially similar to each other, and both report revenue and income that are substantially less than the revenue and income CAGC reported in the 2009 Q3 10-Q with the SEC.

| (In USD Million) | SEC Nine Month Ended Sept. 30, 2009 | SAIC for Entire fiscal Year 2009 | SAT for Entire fiscal Year 2009 |
|---|---|---|---|
| Net Revenue | $55.38 | $7.02 | $7.59 |
| Net Income | $12.83 | $0.97 | $0.93 |

48. The financial statements filed by CAGC with the two PRC government authorities indicate the true financial performance of the Company because.

- Under PRC law, penalties for filing false SAIC filings include fines and revocation of the entity's business license.[3]
- If an entity's business license is revoked, the People's Bank of China[4] requires all bank accounts of that entity be closed.[5]

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[2] The SAT (State Administration of Taxation) is PRC equivalent of the Internal Revenue Service in the U.S.

[3] "Measures for the Annual Inspection of Enterprises" issued on February 24, 2006, Article 20.

[4] People's Bank of China in PRC is equivalent to the Federal Reserve in the U.S.

- Without a business license the entity cannot legally conduct any business.
- Under PRC law, filing false tax documents is a crime subject to severe criminal and civil penalties, including imprisonment.[6]
- The financial statements CAGC filed in the PRC with the SAIC are all audited by CPA firms.[7]

49. Therefore, CAGC's 2009 Q3 10-Q is false and materially misleading.

### B. CAGC's 2009 10-K is False and Materially Misstated

50. On April 1, 2010, the Company issued its fiscal 2009 annual report on form 10-K ("2009 10-K") containing false and misleading financial statements for fiscal years 2008 and 2009.

51. The false and misleading 2009 10-K was signed by defendants Chang, Tang, Teng, Bennett, Dai, Zhang, Law and Wang. Defendants Chang and Tang signed the accompanying SOX certifications,

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[5] "Measures for the Administration of RMB Bank Settlement Accounts" issued in April 2003. (No.5 [2003]), Article 49.

[6] Article 201 of the Criminal Law of PRC; Article 63 of the Law of PRC Concerning the Administration of Tax Collection.

[7] Beijing Agritech's 2008 and 2009 financial statements are audited by Beijing Zhonghui Xincheng CPA Firm. Pacific Dragon's 2008 and 2009 financial statements are audited by Heilongjiang Huaxin CPA Firm. Xinjiang Agritech's 2008 and 2009 financial statements are audited by Xinjiang Runtong CPA Firm. Anhui Agritech's 2008 and 2009 financial statements are audited by Bengbu Tianyi CPA Firm.

attesting to the accuracy of CAGC's financial statements.

52. The 2009 10-K was false and materially misstated because: i) It materially misstated the Company's revenue and net income for fiscal year 2008 and 2009; and ii) It concealed material related party transactions.

**1. CAGC Kept Two Materially Different Sets of Books: The Financial Statements CAGC Filed with Chinese Authorities Report a Tiny Fraction of the Revenue and Income contained in the Financial Statements CAGC Filed with the SEC**

53. The revenue and net income reported by CAGC with the PRC SAIC and SAT for fiscal 2008 and 2009 are substantially less than those reported by CAGC with the SEC.

54. For fiscal 2008, the Company reported $45.24 million net revenue and $9.83 net income to the SEC. However, the revenue it reported to the PRC SAIC and SAT was no more than $3 million, with a net loss of more than ($1.88) million.

55. CAGC overstated revenue by at least 1,444% for fiscal 2008. It fabricated a profitable fiscal year for 2008 while the Company was in fact losing money.

| (In USD million) | SEC 2008 | SAIC 2008 | SAT 2008 | Amount of Overstatement from SAIC to SEC | SAIC Amount as % of SEC |
|---|---|---|---|---|---|

| | | | | | |
|---|---|---|---|---|---|
| Net Revenue | $45.24 | $2.93 | $2.4 | $42.31 | $6.48% |
| Net Income | $9.83 | ($1.88) | ($2.03) | $11.71 | n/a |

56. For fiscal 2009, the Company reported $76.13 million net revenue and $6.17 net income to the SEC. However, CAGC reported revenue to the PRC SAIC and SAT that was no than $7.6 million, with net income of less than $1 million.

57. CAGC overstated revenue by at least 900% and overstated net income by at least 536% for fiscal 2009.

| (In USD million) | SEC 2009 | SAIC 2009 | SAT 2009 | Amount of Overstatement from SAIC to SEC | SAIC Amount as % of SEC |
|---|---|---|---|---|---|
| Net Revenue | $76.13 | $7.02 | $7.59 | $69.11 | 9.22% |
| Net Income | $6.17 | $0.97 | $0.93 | $5.2 | 15.72% |

58. CAGC's fraudulent revenue reporting has also been verified by Plaintiff's investigators' site visits to CAGC's factories.

59. According to Plaintiffs' investigator, CAGC subsidiary Beijing Agritech is an idle factory with no significant operation.[8]

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[8] Though CAGC did not disclose in its SEC filings about annual production of Beijing Agritech, it did confirm in its February 10, 2011 Letter to Shareholders that the factory in Beijing is fully operational.

- Plaintiffs' investigators visited Beijing Agritech's factory in Pinggu, Beijing on a weekday in early June, 2011. The investigators found no evidence of operations at the factory. The door was locked. They did not see any movement of workers or machines through the window. There were no trucks or vehicles entering or exiting.
- When the investigators inquired to the gatekeepers about meeting with or talking to the sales department, they were refused entry to the factory. Nor would the gatekeepers provide any contact information for factory management. The two gatekeepers said currently no officer or manager was in the factory and no one was expected in the factory for another month and that the gatekeepers were currently the only persons in charge of the whole factory.
- The investigators also visited the local government department that supervises and regulates CAGC's (and that factory's) business. The department is known as the Administrative Committee of Beijing Xinggu Economic Development Zone. This is the government administrative organ that has responsibility for overall management of the economic zone in which CAGC's factory resides.[9] Plaintiffs'

[9] The Administrative Committee's duties include, but are not limited to, planning and overseeing the economic zone's construction and development, investment and business start-ups, coordination between the various departments for serving the business development, and daily supervision of enterprises that are operating in the zone. Thus the committee usually

investigator interviewed Mr. Yin, the director of Investment Invitation Section I under the Administrative Committee, and was told by him that Beijing Agritech rarely has any production. Its gate is locked all the time. The management has refused the Administrative Committee's several requests for routine site visits. Mr. Yin was also told by Beijing Agritech that this factory was not in operation.

60. For Anhui Agritech, CAGC released more than 10 pictures inside the factory in February 2011, in an effort to rebut the negative facts in the LM Report. Those pictures, however, show that the company did not have basic equipment, such as forklifts, necessary for operations. One picture showed that human laborers were used to move the 40kg (88lb.) fertilizer bags manually. Since this factory was reported to manufacture 100,000 tons of granular fertilizer annually, it means 37 workers have to move 2.5 million bags weighing 40kg each year (185 bags/day per person assuming they work 365 days a year), an impossible method of operation.[10]

61. As to Xinjiang Agritech, it was not incorporated until December 2008. According to LM Report, the Xinjiang Agritech plant is actually a warehouse, shared with two other companies and demonstrates no activity.

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keeps the most comprehensive information of all enterprises operating in the zone.

[10] An educated estimate based on CAGC's total employees and production capacity of each subsidiary. This assumes a bag is moved only once following production.

62. In summary, CAGC materially overstated it production.

63. In addition, financial statements filed by CAGC subsidiary Pacific Dragon with local SAIC show its revenue for 2008 and 2009 was only $76,811 and $85,294, respectively, far less than the purported annual rent stated in SEC filed financial statements in $518,940.

64. It is a common sense that no company would spend six times its revenue for rent expenses.

65. Similarly, the financial statements filed by CAGC subsidiary Anhui Agritech with the local SAIC show its revenue for 2009 was only $77,941, far less than the purported annual rent of $432,900 reported in CAGC's SEC filings.

66. As shown by the discrepancy between the PRC SAIC revenue, income and expenses, CAGC has been keeping two materially different sets of books, one for the PRC authorities and one for the SEC.

**2. Related Party Transactions**

67. The 2009 10-K was false and misleading also because it concealed related party transactions with CAGC's CEO Chang.

68. CAGC's third largest supplier - Shenzhen Hongchou Technology Company Ltd. ("Shenzhen Hongchou") was 90% owned by CAGC CEO, President, Secretary and Chairman of the Board Defendant Chang at all relevant times until at least January 5, 2011, when he claims to have transferred his

shares to another individual Haibo Li.[11]

69. Generally Accepted Accounting Principles ("GAAP"), Statement of Financial Accounting Standards ("SFAS") and SEC regulations required the Company to disclose all material related party transactions.

70. Statement of Financial Accounting Standards ("SFAS") No. 57 and No. 850 provide that a public company's "[financial statements shall include disclosures of material related party transactions." SFAS No. 57 ¶ 2; 850-10-50-1.

71. "Related party transactions" include those between "an enterprise and its principal owners, management, or members of their immediate families" and those between a company and its "affiliates." SFAS No. 57 ¶ 1; 850-10-05-3. "Affiliate" includes any company that is under common control or management with the public company. SFAS No. 57 ¶ 24(a, b); 850-10-20.

72. Disclosures of related party transactions shall include (a) the nature of the relationship involved, (b) a description of the transactions for each period for which income statements are presented and such other information necessary to an understanding of the effects of the transactions on the financial statements, (c) the dollar amount of transactions for each of the periods for which income statements are presented, and (d) amounts due from or to related

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[11] Perhaps not coincidentally, Ms. Haibo Li's mother is the owner of Harbin Hai Heng Chemical Dist. Co., another principal supplier to CAGC (supplying 17% of CAGC's raw materials).

parties as of the date of each balance sheet presented and, if not otherwise apparent, the terms and manner of settlement. SFAS No. 57 ¶ 2; 850-10-50-1.

73. In its May 14, 2009 10-Q, CAGC attached a contract dated December 8, 2009 between CAGC's subsidiary Pacific Dragon Fertilizer Co., Ltd. and Shenzhen Hongchou in which CAGC's subsidiary promised to purchase 26.9 million RMB ($4.0 million) of raw materials from Shenzhen Hongchou.[12]

74. According to the 2009 10-K, CAGC purchased 15% and 12% of its raw materials from Shenzhen Hongchou in fiscal 2009 and 2008.

75. CAGC, however, did not disclose that 90% of Shenzhen Hongchou's shares were owned by CAGC CEO, President, Secretary and Chairman defendant Chang and that the above purchases were related party transactions.

76. Shenzhen Hongchou's SAIC filings show that Chang has owned 90% of its shares since August, 2004, while Ms. Haibo Li owned the remaining 10%.

77. In addition, Haibo Li's sister is a branch manager for Pacfic Dragon, the CAGC subsidiary that signed the related party contract with Shenzhen Hongchou.

78. The SAIC filings also show that Shenzhen Hongchou's annual revenue was only $4,822.00 (RMB 33,269.23) in fiscal 2008, substantially less than CAGC' s purported purchases from it.

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[12] The contract is attached and incorporated by reference herein.

79. Notably, CAGC reported in the 2009 10-K that "We purchase the majority of our raw materials from suppliers located in the PRC and use suppliers that are located in close proximity to our manufacturing facilities, which helps us to contain our cost of revenue." Shenzhen Hongchou, however, is not close to Pacific Dragon Fertilizer Co., Ltd. or to any of CAGC's subsidiaries. The closest CAGC subsidiary to Shenzhen Hongchou is Anhui Agritech, which is more than 1,300 km (808 miles) away. Pacific Dragon is more than 3,000 km (1,864 miles) from Shenzhen Hongchou.

80. The only reason for CAGC to choose Shenzhen Hongchou as its major supplier is to personally benefit CEO, President, Secretary and Chairman of the Board defendant Chang.

### 3. CAGC's Other Suppliers Raise Serious Questions

81. According to CAGC's 2009 10-K, Beijing Zhongxin Chemical Technology Development Co., ("Beijing Zhongxin") was its largest supplier. CAGC purchased 18% and 33% of its raw materials from it in fiscal years 2009 and 2008, respectively. On December 2, 2008, CAGC's subsidiary Pacific Dragon Fertilizer Co., Ltd. signed a contract to purchase 59.6 million RMB ($8.7 million) of raw materials (fulvic acid) from Beijing Zhongxin.[13]

- After extensive government database searches and website searches in all possible transliterated Chinese names, Plaintiffs' counsel's in-

[13] The contract is attached and incorporated by reference herein.

vestigator could not find such company.[14] Plaintiffs believe Beijing Zhongxin does not exist or if it does exist in some form, it is a non-operational shell company.

- If Beijing Zhongxin does exist, it should be an important and well-known player in the market for fertilizer raw materials since it has millions of dollars in annual sales. It is unlikely that CAGC is its only customer. Yet, when Plaintiffs counsel's investigator interviewed managers at Beijing Dahua Fertilizer Co., Ltd. and Beijing Aojia Fertilizer Co., Ltd., two well-known fertilizer manufacturers in Beijing, they stated that they are quite familiar with the industry, but neither of them has ever heard of Beijing Zhongxin.

- Therefore, Plaintiffs' investigator believes that Beijing Zhongxin does not exist and may be a front to siphon funds from CAGC.

82. According to CAGC's 2009 10-K, Harbin Hai Heng Chemical Distribution Co., Ltd., ("Harbin Hai Heng") was its second largest supplier. On December 5, 2008, CAGC's Pacific Dragon subsidiary signed a

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[14] LM Report also questioned CAGC's mysterious suppliers because those companies "cannot be found in any directory under possible Chinese names that would correspond to the transliterated names or under the alphabetic names." However, in its response, CAGC still did not disclose the suppliers' Chinese names. It only referred to the link of its SEC filings where only English names were disclosed. It appears defendants did not disclose the Chinese names because one of the suppliers was owned by CEO/Chairman/President Chang and he did not want to be discovered, while the other supplier does not exist.

contract with Harbin Hai Heng to purchase 43.4 million RMB ($6.0 million) of raw materials from Harbin Hai Heng.[15] CAGC purchased 17% and 12% of raw materials from Harbin Hai Heng in fiscal 2009 and 2008, respectively.

- However, Harbin Hai Heng's PRC SAIC records show that this company did not participate in the mandatory annual inspection for fiscal year 2008 and 2009, implying that it has been a non-active business since 2007. Failing to file the annual inspection will not only bring substantial penalties, but also the risk of revocation of the entity's business license.[16] Without a business license, a company cannot conduct any business in the PRC or even maintain a bank account.
- Harbin Hai Heng is a shell company. According to a credit report issued by Qingdao Intercredit, a reputable credit reporting agency in China, Harbin Hai Heng has no known phone number, no website, no information obtainable online and no determinable business operations. These facts have also been verified by Plaintiffs' investigator through extensive database searches.
- Furthermore, Harbin Hai Heng is owned by Guirong Yin who is the mother of Ms. Haibo Li, Chang's business partner in Shenzhen

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[15] The contract is attached and incorporated by reference herein.

[16] PRC "Measures for the Annual Inspection of Enterprises" issued on February 24, 2006, Article 19.

Hongchou, the third largest supplier of CAGC -- which was 90% owned by Chang until January 2011 when Chang transferred his 90% interest to Haibo Li. Haibo Li's sister is a branch manager for CAGC subsidiary Pacific Dragon which signed the $4.0 million contract with Shenzhen Hongchou. Defendant CEO Chang's full relationship with the Li family is not yet known, but it is clearly deep.

83. According to CAGC's 2009 10-K, Langfang Tong Chuang Industrial and Trading Company Ltd ("Langfang Tong Chuang") was its fourth largest supplier. CAGC purchased 13% and 11% of its raw materials in 2009 and 2008 year, respectively.

- Langfang Tong Chuang's PRC SAIC records show that this company's business scope is limited to "sales of paper, daily grocery, iron powder, construction materials, steel, auto parts, and plastic products and machining." None of CAGC's reported purchases of nitrogen, phosphorus and kalium or any similar chemical material is included within the scope of allowable business operations.

- According to PRC regulations, a company's registered business scope is determined by its Articles and monitored by local authorities. A company is not allowed to conduct any business beyond the registered scope without amendment to its Articles and SAIC registra-

tion, unless specifically approved by the SAIC.[17]

- Langfang Tong Chuang's SAIC records do not show any approval for the manufacture, sale or distribution of raw materials for fertilizer.
- Furthermore, its SAIC filings show that the company's revenue was $208,370 and $216,350 for the fiscal year 2009 and 2008, respectively,[18] substantially less than CAGC's purported purchase from it.

84. There is no plausible legitimate business explanation for CAGC's payments to Beijing Zhongxin, Harbin Hai Heng and Langfang Tong Chuang as these three purported suppliers clearly did not provide raw materials to CAGC in the amounts reported by CAGC.

85. Furthermore, because operating capital is very scarce in China, it is not the general business practice to provide suppliers with large cash advances. Yet, CAGC made huge cash advances to its suppliers for the future purchase of raw materials. As of December 31, 2009 and 2008, total cash advances made to the four suppliers amounted to $25.35 million and $10.8 million, respectively.

## V. CAGC'S STOCK PRICE DROPPED AS INVESTORS SLOWLY LEARNED THAT

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[17] Company Law of the People's Republic of China, Article 11.

[18] Exchange rate for 2008 is RMB 6.9 : USD 1, for 2009 is RMB 6.8 : USD 1.

## CAGC'S FINANCIAL STATEMENTS WERE INACCURATE

### A. The LM Report And Its Aftermath

86. On February 3, 2011, the research firm LM Research published a report asserting that China Agritech was a fraud.

87. The Report, asserted that the Company's financial statements were fraudulent. It alleged revenue was overstated and that the company's factory plants are idle.

88. The adverse news disclosed by the LM Report caused the Company's stock to decline from its closing price of $10.78/share on February 2, 2011 to $9.12/share before closing at $9.85/share on February 3, 2011 — a day over day decline of 8.63%.

89. The next day, CAGC vigorously denied the allegations made in the LM report. The response only helped recovery of the stock price by $0.14/share or 1%. Ironically, Charles Law, one of CAGC's Board of Directors, resigned on that day.

90. CAGC continued to deny the allegations of fraud publicly. Yet, as a result of the allegations of fraud, several analyst firms downgraded CAGC, causing a selloff and declines in its share price.

91. On February 7, 2011, analyst firm Brean Murray downgraded CAGC. Also on February 7, 2011, YQV downgraded CAGC to hold and Rodman & Renshaw placed CAGC's rating under review as a result of the allegations of fraud in the LM Report.

92. On February 8, 2011, analyst firm Chardan lowered its price target for CAGC from $8 to $5. And

based on a lack of credibility in management rated CAGC a sell.

### B. The Bronte Report And Its Aftermath

93. On February 15, 2011 Bronte Capital issued a scathing report presenting additional facts indicating that CAGC was a fraud and could not possibly have produced the revenue it claimed in its financial statements.

94. As a result of the Bronte Capital report, CAGC stock price dropped from $9.21/share on February 5, 2011 to $7.44/share on February 16, 2011 — more than 19% - on extremely heavy volume.

### C. E & Y's Can No Longer Trust Management and Nasdaq Halts Trading in CAGC Stock

95. A month later, on March 13, 2011, CAGC announced formation of a Special Committee of its Board of Directors ("the Special Committee") to investigate the allegations of fraud made by third parties.

96. The next day CAGC dismissed Ernst & Young Hua Ming as the Company's independent auditor citing the following reasons as disclosed in the 8-K filed on March 13, 2011:

> "On November 13, 2010, China Agritech, Inc. (the "Company") appointed Ernst & Young Hua Ming ("E&Y") as its independent registered public accounting firm. On March 14, 2011, the Company terminated the services of E&Y.

...On December 15, 2010, E&Y provided a letter to the Audit Committee of the Board of Directors of the Company (the "Audit Committee") describing certain matters that, if not appropriately addressed in a timely manner, may result in audit adjustments, significant deficiencies or material weaknesses and/or delays in meeting the 10-K filing deadline. ... On March 8, 2011, E&Y informed the Audit Committee that it had encountered additional issues and concerns that, in E&Y's view, required additional information and procedures, **including the initiation of an independent investigation, in order to verify certain transactions and balances recorded on the Company's financial statements and records for the year ended December 31, 2010. E&Y also orally advised the Audit Committee that it may not be able to rely on management's representations based on the issues identified.**

**E&Y informed the Company that the issues identified in performing their audit may, if further investigated, have adverse implications for the financial statements covering the three quarterly reports filed by the**

> **Company on Form 10-Q during 2010,** and advised the Audit Committee to inform the predecessor auditors of the issues identified, so that they can assess the impact on prior financial reports."

[Emphasis added]

97. Thus, CAGC had concealed that E &Y had identified serious problems with its financial statements as early as December 15, 2010 and had informed CAGC's board that an internal investigation was necessary.[19] CAGC had misled investors to believe that the investigation was not connected at all with E&Y's audit and concealed that E &Y had demanded the internal investigation as a result of serious issues with CAGC's financial statements. But CAGC failed to correct the problems with the financial statements, failed to provide verification for certain transactions — prompting **"E&Y ... orally advise[] the Audit Committee that it may not be able to rely on management's representations based on the issues identified."**

98. Thus, the March 14, 2011 press release shocked investors by disclosing that Defendants had concealed that E&Y had insisted that the board commence an investigation and that Defendants had concealed that the failure of CAGC to file its 10-K timely was a result of accounting problems that E& Y had indentified back in December 2010 —leading

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[19] After retaining a law firm and accounting firm to conduct the investigation for more than four months, CAGC has still not disclosed the results of the investigation.

to the investigation. Thus, investors learned for the first time that E& Y had identified problems with CAGC's financial statements. This news crushed any remaining credibility CAGC management had because E&Y stated it could not rely on management's representations.

99. Also on March 14, 2011, the Nasdaq delisted and halted trading in CAGC stock with its share price at $6.88/share.

100. Then, Defendant Wang, a member of the Company's Board of Directors, as well as a member of the special committee of the Board of Directors, resigned without a word.

101. On May 20, 2011, CAGC stock opened for trading on the pink sheets at $1.50/share having dropped $5.38/share from its previous pre-halt trading price. CAGC shares traded as low as $1.00/share before closing for trading at $3.80/share. The next trading day, CAGC shares dropped another $0.80/share to $3.00/share on heavy trading.

102. The share price decline on May 20 and 23 was a direct result of the negative news concerning E&Y disclosed on March14, 2011 and the resignation of defendant Wang as a director, who had served as a representative of Carlyle —further eliminating any credibility for CAGC.

103. CAGC shares currently are valued at $1.55/share as of June 21, 2011.

104. Thus investors have seen the value of their shares drop from $10.78/share on February 2, 2011 when the fraud was first disclosed to $1.55/share as of June 21, 2011 — a loss of $9.23/share.

## VI. ADDITIONAL FACTS SUGGESTIVE OF SCIENTER

### A. Defendants' Stock Sales Demonstrate Scienter

105. Defendants have also profited handsomely from sales of CAGC stock. This demonstrates that defendants had a strong profit motive to inflate the stock price by overstating its financials.

106. CAGC filed a prospectus with the SEC on May 4, 2010 registering for sale large amounts of CAGC stock owned by Defendants. While it is not clear exactly how much stock each defendants sold pursuant to the Registration Statement, Defendants were each motivated, and intended, to sell CAGC stock and earn tens of millions in profits.

107. Scienter is also supported by fact that CAGC was able to conduct an equity offering to take advantage of CAGC stock's artificially inflated price. In May, 2010, CAGC sold over 1.243 million shares of its stock at $16.10/share raising approximately $21 million; along with the exercise of warrants, CAGC raised an additional $10 million.

108. Defendants Teng, Tang and Zhu all profited handsomely from sales of CAGC stock during the period of the fraud. A list of their specific CAGC share sales are as follows.

| Name | Position | Date | Amount | Proceeds |
|---|---|---|---|---|
| **Xiaorong Teng** | Director/COO | 13-May-10 | 10,000 | $169,400 |
| | | 26-May-10 | 10,000 | $127,846 |
| | | 01-Jun-10 | 7,200 | $92,835 |
| | | 23-Jul-10 | 31,900 | $384,921 |

| | | | | |
|---|---|---|---|---|
| | | 26-Jul-10 | 20,000 | $251,064 |
| | | 10-Feb-11 | 100 | $1,294 |
| | | 11-Feb-11 | 11,668 | $151,149 |
| | | 12-Feb-11 | 8,232 | $106,856 |
| | | | **TOTAL** | **$1,285,384** |
| | | | | |
| **Yau-Sing Tang** | CFO | 12-May-11 | 10,000 | $153,000 |
| | | 13-May-11 | 5,000 | $83,000 |
| | | 07-Jun-10 | 5,000 | $56,920 |
| | | 02-Aug-10 | 10,000 | $130,000 |
| | | 03-Aug-10 | 10,000 | $140,334 |
| | | 06-Aug-10 | 10,000 | $150,544 |
| | | 29-Dec-10 | 5,000 | $82,500 |
| | | 30-Dec-10 | 5,000 | $85,000 |
| | | 06-Jan-10 | 5,000 | $87,500 |
| | | | **TOTAL** | **$908,798** |
| | | | | |
| **Mingfang Zhu** | COO | 18-May-10 | 1,900 | $29,640 |
| | | 19-May-10 | 28,100 | $363,033 |
| | | 27-May-10 | 20,000 | $260,208 |
| | | 04-Jun-10 | 20,000 | $240,290 |
| | | | **TOTAL** | **$893,172** |

## B. CAGC's Misconduct Was So Serious that NASDAQ Delisted the Company's Securities from Trading

109. CAGC's misconduct was evidently serious enough that on April 12, 2011, it received a letter

from NASDAQ stating that:[20]

- "the staff of Nasdaq believes that the continued listing of the Company's securities on Nasdaq is no longer warranted based on public interest concerns and the Company's failure to file its 2010 Form 10-K on time (the "Nasdaq Letter").
- "the staff of Nasdaq believes that the serious concerns raised by our former auditors, Ernst & Young Hum Ming ("E&Y"), relating to issues surfacing in the audit process rise to the level of a public interest concern, ... .

### C. The Revolving Door for CAGC's Auditors

110. CAGC has changed auditors four times in three years. Since 2008, the Company has had four independent auditors.

111. Kabani & company, Inc., ("Kabani") a Los Angeles-based accountancy, audited the Company's 2007 financials. Kabani was the accountancy that audited the notoriously fraudulent Bodisen Biotech, an organic fertilizer company that was delisted in 2007, and China Green Agriculture (CGA), a firm which was also disclosed having falsely reported its results to U.S. investors.

112. In April 2008, CAGC terminated Kabani and retained Crowe Horwath LLP as its auditor. CAGC then terminated Crowe Horwath and retained E&Y in November, 2010.

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[20] CAGC disclosed the letter in its 8-K filed with the SEC on April 18, 2011.

113. However, CAGC fired E&Y four months later due after E&Y identified issues in the 2009 audit, and stated it could no longer rely on representations of CAGC management.

114. On April 12, 2011, CAGC announced it had hired Simon & Edward LLP as its new independent auditor to replace E & Y. Still, CAGC has not produced audited financial statements for fiscal year 2010.

## D. The SEC has Warned of Reverse Merger Companies Such as CAGC

a. Chinese reverse mergers have been a magnet for disreputable stock promoters, leading the SEC to issue warnings about investing in companies like CAGC.

b. Shielded by the geographic distance of thousands of miles and operating under a regulatory framework that is a world apart from the SEC's oversight, RCM companies have few incentives to provide complete and accurate disclosures to American investors. An August 28, 2010 article in *Barron's* by Bill Alpert and Leslie P. Norton entitled, "Beware This Chinese Export," discusses the enforcement problems that American regulators face when dealing with Chinese companies that trade on U.S. exchanges through RCMs. The article states that "[t]he SEC's enforcement staff can't subpoena evidence of any fraudulent activities in China, and Chinese regulators have little incentive to monitor shares sold only in the U.S."

c. U.S. regulators have finally begun to take notice of the manipulation and fraud endemic in RCMs.

The SEC has recently established a task force to investigate investors' claims regarding the impropriety and fraud of RCMs trading on the U.S. markets. SEC Commissioner Luis A. Aguilar (the "Commissioner") discussed Chinese reverse mergers and the process of "backdoor registration," stating:[21]

> In the world of backdoor registrations to gain entry into the U.S. public market, the use by Chinese companies has raised some unique issues, even compared to mergers by U.S. companies. Two important ones are:
>
> - First, there appear to be **systematic concerns with the quality of the auditing and financial reporting**; and
> - Second, even though these companies are registered here in the U.S., there **are limitations on the ability to enforce the securities laws, and for investors to recover their losses when disclosures are found to be untrue, or even fraudulent**.
>
> **I am worried by the systematic concerns surrounding the quality of the financial reporting by these companies**. In particular, according to a recent report by the staff of the Public Company Accounting Oversight Board (PCAOB), U.S. auditing firms may be issuing audit opinions on the financials, but not engaging in any of their own work. Instead, the U.S. firm may be issuing an opinion based almost entirely on

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[21] Text of the entire speech is available at http://sec.gov/news/speech/2011/spch040411laa.htm#P79_43025.

work performed by Chinese audit firms. If this is true, it could appear that the U.S. audit firms are simply selling their name and PCAOB-registered status because they are not engaging in independent activity to confirm that the work they are relying on is of high quality. This is significant for a lot of reasons, including that the PCAOB has been prevented from inspecting audit firms in China.

d. On June 9, 2011, the SEC issued an Investor Bulletin warning investors about investing in companies that enter U.S. markets through RCM "... there have been instances of fraud and other abuses involving reverse merger companies." "Given the potential risks, investors should be especially careful when considering investing in the stock of reverse merger companies," said Lori J. Schock, Director of the SEC's Office of Investor Education and Advocacy.

## VII. PLAINTIFFS' CLASS ACTION ALLEGATIONS

115. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of a Class consisting of all persons who purchased the common stock of CAGC during the Class Period and who were damaged thereby. Excluded from the Class are Defendants, the present and former officers and directors of CAGC and any subsidiary thereof, members of any defendants' immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

116. The members of the Class are so numerous

that joinder of all members is impracticable. Throughout the Class Period, CAGC's stock was actively traded on the NASDAQ at all times during the Class Period.

117. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are at least hundreds, if not thousands, of members in the proposed Class. Members of the Class may be identified from records maintained by CAGC or its transfer agent and may be notified of the pendency of this action by mail, using a form of notice customarily used in securities class actions.

118. Plaintiffs' claims are typical of the claims of the members of the Class, as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

119. Plaintiffs will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation.

120. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether the federal securities laws were violated by Defendants' acts as alleged herein;

b. whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the business, and financial performance of CAGC; and

c. to what extent the members of the Class have sustained damages and the proper measure of damages.

121. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to redress individually the wrongs done to them. There will be no difficulty in the management of this action as a class action.

## VIII. RELIANCE PRESUMPTION

122. At all relevant times, the market for CAGC common stock was an efficient market for the following reasons, among others:

a. CAGC stock met the requirements for listing, and was listed and actively traded on the on the NASDAQ market (under ticker symbol "CAGC"), a highly efficient and automated market;

b. On average there were 18.8 million shares of the Company's common stock issued and outstanding during the Class Period. The public float (shares not held by insid-

ers/defendants) was 10.5 million shares on average during the Class Period;

c. During the class period, on average, 4.4 million shares of CAGC common stock were traded on a weekly basis. Approximately 42.5% of the public float, and 23.5% of all outstanding shares, were bought and sold on a weekly basis, demonstrating a very strong presumption of an efficient market;

d. As a regulated issuer CAGC filed with the SEC periodic public reports and was eligible (and did file) S-3 registration statements with the SEC during the Class Period;

e. CAGC regularly communicated with public investors via established market communication mechanisms, including regular disseminations of press releases on the national circuits of major newswire services and other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services;

f. CAGC was followed by several securities analysts employed by major brokerage firms including Brean Murray, Rodman and Renshaw and Chardan (among others), who wrote reports that were distributed to the sales force and certain customers of their respective brokerage firms during the Class Period;

g. At least 75 NASD member firms were active market-makers in CAGC stock at all times during the Class Period; and

h. Unexpected material news about CAGC was rapidly reflected in and incorporated into the Company's stock price during the Class Period.

## IX. FIRST CAUSE OF ACTION

### Violation of Section 10(b) of The Exchange Act Against and Rule 10b-5 Promulgated Thereunder Against All Defendants But Excluding Rodman & Renshaw and Crowe Horwath

123. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

124. This cause of action is asserted against all Defendants, except it specifically excludes Rodman & Renshaw and Crowe Horwath.

125. During the Class Period, defendants carried out a plan, scheme and course of conduct which was intended to, and throughout the Class Period, did: (1) deceive the investing public, including Plaintiffs and other Class members, as alleged herein; and (2) cause Plaintiffs and other members of the Class to purchase and/or sell CAGC's securities at artificially inflated and distorted prices. In furtherance of this unlawful scheme, plan and course of conduct, defendants, individually and as a group, took the actions set forth herein.

126. Defendants, individually and in concert, directly and indirectly, by the use, means or instru-

mentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business, operations and future prospects of CAGC as specified herein.

127. Defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of CAGC's value and performance and continued substantial growth, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about CAGC and its business operations and financial condition in light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business that operated as a fraud and deceit upon the purchasers CAGC securities during the Class Period.

128. Each of the defendants' primary liability, and controlling person liability, arises from the following: (a) defendants were high-level executives, directors, and/or agents at the Company during the Class Period and members of the Company's management team or had control thereof; (b) by virtue of their responsibilities and activities as senior officers and/or directors of the Company, were privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; (c) defendants enjoyed significant personal contact and familiarity with the other

members of the Company's management team, internal reports and other data and information about the Company's finances, operations, and (d) defendants were aware of the Company's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

129. Defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing CAGC's financial condition from the investing public and supporting the artificially inflated price of its securities. As demonstrated by defendants' false and misleading statements during the Class Period, defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by failing to take steps necessary to discover whether those statements were false or misleading.

130. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price for CAGC's securities was artificially inflated during the Class Period.

131. In ignorance of the fact that market prices of CAGC's publicly-traded securities were artificially inflated or distorted, and relying directly or indirectly on the false and misleading statements made by

defendants, or upon the integrity of the market in which the Company's securities trade, and/or on the absence of material adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, Plaintiffs and the other members of the Class acquired CAGC's securities during the Class Period at artificially high prices and were damaged thereby.

132. At the time of said misrepresentations and omissions, Plaintiffs and other members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiffs and the other members of the Class and the marketplace known the truth regarding CAGC's financial results and condition, which were not disclosed by defendants, Plaintiffs and other members of the Class would not have purchased or otherwise acquired CAGC securities, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices or distorted prices at which they did.

133. By virtue of the foregoing, the defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

134. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiffs and the other members of the Class suffered damages in connection with their respective purchases and sales of the Company's securities during the Class Period.

135. This action was filed within two years of discovery of the fraud and within five years of Plaintiffs' purchases of securities giving rise to the cause of action.

## X. SECOND CAUSE OF ACTION

### Violation of Section 20(a) of The Exchange Act Against the Individual Defendants

136. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

137. This Second Claim is asserted against each of the Individual Defendants, and it specifically excludes Rodman & Renshaw and Crowe Horwath.

138. The Individual Defendants, acted as controlling persons of CAGC within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, agency, and their ownership and contractual rights, participation in and/or awareness of the Company's operations and/or intimate knowledge of aspects of the Company's revenues and earnings and dissemination of information to the investing public, the Individual Defendants had the power to influence and control, and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements that Plaintiffs contend are false and misleading. The Individual Defendants were provided with or had unlimited access to copies of the Company's reports, press releases, public filings and other statements alleged by Plaintiffs to be misleading prior to and/or shortly after these statements were issued, and had the ability to prevent the issuance of the statements or to cause the statements to be corrected.

139. In particular, each of these Defendants had direct and supervisory involvement in the day-to-day

operations of the Company and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

140. As set forth above, CAGC and the Individual Defendants each violated Section 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint.

141. By virtue of their positions as controlling persons, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act as they culpably participated in the fraud alleged herein. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs and other members of the Class suffered damages in connection with their purchases of the Company's common stock during the Class Period.

142. This action was filed within two years of discovery of the fraud and within five years of Plaintiffs' purchases of securities giving rise to the cause of action.

## XI. THIRD CAUSE OF ACTION

### Violation of §11 of the Securities Act Against All Defendants

143. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein. This claim is not based on, and does not allege, fraud.

144. This §11 claim is asserted against all Defendants.

145. This claim is brought by Plaintiff Tan Tee Yong on his own behalf and on behalf of other members of the Class who acquired CAGC stock pursuant to or traceable to CAGC's Offering completed on and about May 4, 2010.

146. Each Class Member acquired his, her, or its shares pursuant to and/or traceable to, and in reliance on, the Registration Statement and Prospectus. CAGC is the issuer and Rodman & Renshaw is the Underwriter of the securities through the Registration Statement and Prospectus.

147. On April 29, 2010, the Company filed a Registration Statement and Prospectus with the SEC on form 424B5.[22]

148. The Prospectus incorporated by reference CAGC's false financial statements for fiscal years 2008 and 2009 that were contained in CAGC's 2008 and 2009 10-K.

149. The Prospectus contained the same false and misleading financial statements contained in CAGC's 2008 10-K and 2009 10-K as described above.

150. CAGC's 2008 and 2009 financial statements were materially false for the reasons set forth above.

151. The Individual Defendants are signatories of the Registration Statement and Prospectus.

152. Each of the Defendants owed to the purchasers of the stock obtained through the Registration

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[22] The Prospectus was pursuant to CAGC's Registration Statement No. 333-164810 filed with, and declared effective by, the SEC.

Statement and Prospectus the duty to make a reasonable and diligent investigation of the statements contained in the Registration Statement and Prospectus at the time they became effective to ensure that such statements were true and correct and that there was no omission of material facts required to be stated in order to make the statements contained therein not misleading.

153. None of the Defendants made a reasonable investigation or possessed reasonable grounds for the belief that the false financial statements contained in the Registration Statement and Prospectus were true or that there was no omission of material facts necessary to make the statements made therein not misleading.

154. Defendants issued and disseminated, caused to be issued and disseminated, and participated in the issuance and dissemination of, material misstatements to the investing public that were contained in the Registration Statement and Prospectus, which misrepresented or failed to disclose, among other things, the challenged facts set forth above. By reason of the conduct alleged herein, each defendant violated Section 11 of the Securities Act.

155. CAGC is the issuer of the stock sold in the Offering via the Registration Statement and Prospectus. As issuer of stock, the Company is strictly liable to Plaintiff and the Class for the material misstatements and omissions therein.

156. Crowe audited and certified CAGC's financial statements for fiscal years 2008 and 2009 that were included in the Registration Statement and Prospectus for the Offering.

157. Crowe certified and opined that CAGC's financial statements for 2008 and 2009 that were included in the Registration Statement and Prospectus were accurate and were prepared in accordance with GAAP, when in truth they were not.

158. Rodman and Renshaw was the underwriter for the firm commitment underwriting of the Offering.

159. At the time they purchased their shares of CAGC in the Offering, Plaintiff and members of the Class did so without knowledge of the true facts concerning the misstatements and omissions alleged herein.

160. This action is brought within one year after discovery of the untrue statements and omissions in the Registration Statement and Prospectus that should have been made and/or corrected through the exercise of reasonable diligence, and within three years of the effective date of the Registration Statement and Prospectus.

161. By virtue of the foregoing, Plaintiffs and the other members of the class are entitled to damages under Section 11 as measured by the provisions of the Section 11(e), from the Defendants and each of them, jointly and severally.

## XII. FOURTH CAUSE OF ACTION

### Violation of §15 of the Securities Act Against the Individual Defendants

162. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein. This claim is not based on, and does not allege, fraud.

163. This claim is asserted against each of the Individual Defendants, each of whom was a control person of CAGC during the relevant time period.

164. For the reasons set forth above and pursuant to the first and second claims, CAGC is liable to the plaintiffs and the members of the Class who purchased CAGC common stock in the Offering or pursuant and/or traceable to the Registration Statement based on the untrue statements and omissions of material fact contained in the Registration Statement and Prospectus, under §11 and §12(a)(2) of the Securities Act.

165. The Individual Defendants were control persons of CAGC by virtue of, among other things, their positions as senior officers, directors and/or controlling shareholders of the Company. Each was in a position to control and did in fact control CAGC and the false and misleading statements and omissions contained in the Registration Statement and Prospectus

166. None of the Individual Defendants made reasonable investigation or possessed reasonable grounds for the belief that the statements contained in the Registration Statement and Prospectus were accurate and complete in all material respects. Had they exercised reasonable care, they could have known of the material misstatements and omissions alleged herein.

167. This claim was brought within one year after the discovery of the untrue statements and omissions in the Registration Statement and Prospectus and within three years after CAGC common stock was sold to the Class in connection with the Offer-

ing.

168. By reason of the misconduct alleged herein, for which CAGC is primarily liable, as set forth above, the Individual Defendants are jointly and severally liable with and to the same extent as CAGC pursuant to Section 15 of the Securities Act.

## XIII. JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

**WHEREFORE**, Plaintiffs pray for relief and judgment, as follows:

a. Determining that this action is a proper class action and certifying Plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as Class Counsel;

b. Awarding compensatory damages in favor of Plaintiffs and the other Class members against all Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

c. Awarding Plaintiffs and the Class their reasonable costs and expenses incurred in this action; and

d. Such other and further relief as the Court may deem just and proper.

Dated: June 22, 2011 Respectfully submitted,

**THE ROSEN LAW FIRM, P.A.**

*/s/ Laurence M. Rosen*

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Attorneys for Plaintiffs

## CERTIFICATION

The individual or institution listed below (the "Plaintiff") authorizes the Rosen Law Firm, P.A. to file an action or amend a current action under the federal securities laws to recover damages and to seek other relief against China Agritech. Inc. ("CAGC"), and certain of its officers and directors. The Rosen Law Firm, P.A. agrees to prosecute the action on a contingent fee basis not to exceed one-third of any recovery and will advance all costs and expenses. Any legal fees and expenses will be determined by, and payable, only upon order of the U.S. District Court.

Plaintiff declares, as to the claims asserted under the federal securities laws, that:

1. I have reviewed the complaint against CAGC and certain of its officers and directors and I retain the Rosen Law Finn, P.A. as counsel in this action for all purposes.

2. I did not engage in transactions in the securities that are the subject of this action at the direction of plaintiff's counsel or in order to participate in this or any other litigation under the securities laws of the United States.

3. I am willing to serve as a lead plaintiff either individually or as part of a group. A lead plaintiff is a representative party who acts on behalf of other class members in directing the action, and whose duties may include testifying at deposition and trial.

4. The following is a list of all of the purchases and sales I have made in CAGC securities during the class period set forth in the complaint. I have made

no transactions during the class period in the debt or equity securities that are the subject of this lawsuit except those set forth below.

| Number of Shares Purchased or Sold | Date(s) Purchased | Price Paid Per Share | Date(s) Sold (if applicable) | Price Sold Per Share |
|---|---|---|---|---|
| 5,000 | April 21 2010 | $20.37964 | | $ |
| 5,000 | May 3, 2010 | $16.10 | | $ |
| | | $ | | $ |
| 2,000 | | $ | May 6, 2010 | $ 15.87 |
| 8,000 | | $ | July 7, 2010 | $ 10.60 |

5. I have not, within the three years preceding the date of this certification, sought to serve or served as a representative party on behalf of a class in an action involving alleged violations of the federal securities laws, except: for the following company(ies):

6. I will not accept any payment for serving as a representative party beyond my pro rata share of any recovery, except reasonable costs and expenses, such as travel expenses and lost wages directly related to the class representation, as ordered or approved by the court pursuant to law.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of June, 2011.

Signature: */s/Tan Tee Yong*

Name: Tan Tee Yong

**REDACTED**

* * *

## APPENDIX E

**Decision Denying Class Certification in *Dean***

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES - GENERAL**

| | | | |
|---|---|---|---|
| Case No. | CV 11-01331-RGK (PJWx) | Date | May 3, 2012 |
| Title | | THEODORE E. DEAN v. CHINA AGRITECH, et al | |
| Present: The Honorable | | R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE | |

* * *

## I. INTRODUCTION

On February 2, 2011, Theodore Dean ("Dean"), on behalf of himself and all others similarly situated, filed a Complaint against China Agritech, Inc. ("Agritech") and several individual defendants, including members of Agritech's executive management team and board of directors. On June 22, 2011, Dean filed an Amended Complaint, which added Slava Vanous, Randolph Daniels-Kolin, Clair Harpster, and Tan Tee Yong as plaintiffs. It also added several additional individual defendants, Rodman and Renshaw, LLC, and Crowe Horwath, LLP as defendants ("collectively, Defendants"). The Amended

Complaint alleges claims for violations of (1) Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Securities and Exchange Commission Rule 10b-5 against Agritech and all individual defendants; (2) Section 20(a) of the Exchange Act against the individual defendants; (3) Section 11 of the Securities Act of 1933 ("Securities Act") against all defendants; and (4) Section 15 of the Securities Act against the individual defendants. On October 27, 2011, the Court dismissed the case as to all individual defendants.

Presently before the Court is Slava Vanous's, Randolph Daniels-Kolin's, Clair Harpster's (collectively, "Plaintiffs") Motion for Class Certification pursuant to Federal Rule of Civil Procedure ("Rule") 23 and Agritech's Motion to Exclude the Declaration of Plaintiffs' Expert Dr. Werner.[1] For the following reasons, the Court **DENIES** Agritech's Motion and **DENIES** Plaintiffs' Motion.

## II. FACTUAL BACKGROUND

Agritech is a holding company incorporated in the state of Delaware with its principal place of business in Beijing, China. Agritech manufactures and distributes organic compound fertilizers for agricultural application in China. The company is publicly traded within the United States as a result of a financial technique known as a "reverse merger." In a reverse merger, a private company seeking to trade or sell

[1] This Motion appears to be brought by individual defendants that were dismissed by Court order on October 27, 2011. However, as the Motion is also brought by Agritech, the Court proceeds as if it was brought solely by Agritech.

shares in public equity markets will acquire a publicly traded shell company in order to quickly go public and avoid certain regulatory requirements. Once the reverse merger is complete, management of the former private company generally takes control of the merged company. Agritech completed its merger in 2005 and began publicly offering its stock on the NASDAQ stock exchange.

Plaintiffs allege that Agritech materially misstated its net revenue and income for the third quarter 2009 on its Securities and Exchange Commission ("SEC") Form 10-Q filing. Plaintiffs allege that Agritech also materially misstated its net revenue and income for fiscal years 2008 and 2009 in its 2009 SEC Form 10-K filing. Plaintiffs also allege that on April 29, 2010, Agritech filed a registration statement and prospectus with the SEC on Form 424B5 in anticipation of its public offering completed on May 4, 2010. This form incorporated the allegedly false financial statements for fiscal years 2008 and 2009.

On February 3, 2011, Lucas McGee Research ("LM Research") published a report contending that Agritech was a fraud based on allegations that the company's factories were either not in operation or producing far less than reported. The report further stated that Agritech had filed financial statements to the SEC for fiscal year 2009 that showed substantially larger net revenue as compared to Agritech's filings to the Chinese State Administration for Industry and Commerce ("SAIC"). Additionally, the report alleged that Agritech's factories were idle during that period. After publication of the report, the

value of Agritech stock declined from $10.78 per share on February 2, 2011, to $9.85 per share on February 3, 2011, representing a day-over-day decline of 8.63%. On February 15, 2011, Bronte Capital issued a report containing similar allegations to the LM Research report regarding Agritech's production levels. Agritech's stock value again declined from $9.21 per share on February 4, 2011 to $7.44 per share on February 16, 2011, a decline of approximately 16%.

As a result of these actions, Plaintiffs allegedly suffered damages in connection with the purchase of their Agritech stock.

## III. JUDICIAL STANDARD

Rule 23 governs class actions. To certify a class action, a Plaintiff must first meet the burden of satsifying each of the four prerequisites set out in Rule 23(a). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *as amended* 273 F.3d 1266 (2001). These prerequisites are: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In addition to proving the four prerequisites of Rule 23(a), a plaintiff must establish at least one of the three requirements of Rule 23(b). Rule 23(b) provides that a class action is appropriate where: (1) the prosecution of separate actions would create a risk of

(a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interest of other class members not parties to those adjudications; (2) the party opposing the class has refused to act on grounds that apply generally to the class; or (3) the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

## IV. DISCUSSION

Defendants move to exclude the expert declaration of Dr. Werner. The Court considers this motion and then turns to Plaintiffs' Motion for Class Certification.

### A. Dr. Werner's Declaration Should Not Be Excluded

Agritech argues that the Court should exclude the expert declaration of Dr. Werner because it is unreliable. Specifically, Agritech argues that Dr. Werner did not use generally accepted methods in conducting an analysis of the *Cammer* factors, which he used to determine whether Agritech stock was trading on an efficient market. The Court disagrees.

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or

> to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the Supreme Court held that a district court judge must ensure that any expert scientific testimony is both relevant and reliable. *Id.* at 589. This requires a preliminary assessment, under Federal Rule of Evidence 104(a), as to whether the expert's reasoning and methodology is valid and can properly be applied to the facts of the case. *Id.* at 592-93. To make this determination, a court may consider the following non-exclusive list of factors: (1) whether the theory or method can be or has been tested, (2) whether the theory has been subjected to peer review and publication, (3) the known or potential rate of error of the theory or method, and (4) whether the method has been generally accepted by the community. *Id.* at 593-94. However, the Court may consider other factors and need not consider all the factors listed in *Daubert*. "The trial court must have the same kind of latitude in deciding how to test an expert's reliability . . . as it enjoys when it decides whether or not that expert's relevant testimony is reliable." *Kumho Tire Co v. Carmichael*, 526 U.S. 137, 152 (1999).

Agritech argues that Dr. Werner's analysis of the *Cammer* factors is unreliable. The majority of Agritech's Motion challenges Dr. Werner's analysis of the most important *Cammer* factor: whether there

was a cause-effect relationship between corporate news and the price of Agritech stock. Agritech argues that the analysis is unreliable because Dr. Werner failed to use a generally accepted scientific method in conducting this analysis. To determine whether there was a cause-effect relationship, Dr. Werner conducted an event study. Dr. Feinstein, another of Plaintiff's experts, confirms that "[t]he event study is the paramount tool for testing market efficiency." (Feinstein Decl. ¶ 63 (citing Eugene F. Fama, *Efficient Capital Markets: II, J. Finance*, 1607 (1991)).) Agritech does not set forth any evidence to the contrary. Agritech also attacks the way in which Dr. Werner conducted his event study. Specifically, Agritech takes issue with Dr. Werner's use of subjective criteria in selecting events to study, as well as his use of stock price movement at a statistically insignificant level. Dr. Feinstein, however, confirms that the method used by Dr. Werner to do his event study is the method set forth in the literature. (Feinstein Decl. ¶¶ 67-68.) Additionally, other academics and experts recognize that the selection of events is a subjective task (*see, e.g.*, Feinstein Decl. ¶¶ 20, 70-73; Pl.'s Opp. at 10) and that stock price movement is important and a valid way of assessing the existence of a cause-effect relationship, even if the movement is not statistically significant at that level. Even Defendants' expert, Dr. Roper, uses this method in his academic work.

Defendants also argue that Dr. Werner's analysis of other *Cammer* factors is unreliable. However, as with the cause-effect factor, Plaintiffs have shown that Dr. Werner used reliable methods. Specifically, Dr. Werner's analysis of how many analysts were

following Agritech's stock is reliable because the definition of analyst that Dr. Werner used is supported by the literature, case law, and other experts' opinions. (Pl.'s Opp. at 19.)

That Defendants do not agree with Dr. Werner's conclusions is not enough to make his declaration unreliable. *Daubert*, 509 U.S. at 594-95. Plaintiffs have shown that, in his analysis, Dr. Werner used generally accepted methods that have been used and tested and have appeared in published journals. Therefore, the Court finds that Dr. Werner's declaration is reliable and **DENIES** Defendants' Motion to exclude it.

**B. Class Certification**

Plaintiffs seek to certify a class on behalf of all persons or entities that purchased or otherwise acquired the publicly traded common stock of Agritech between November 12, 2009 and March 11, 2011. Although Plaintiffs satisfy the prerequisites of Rule 23(a), they are unable to satisfy the requirements of Rule 23(b)(3).

*1. The Requirements of Rule 23(a) are Satisfied*

Plaintiffs contend that all four requirements of Rule 23(a) are met. The Court agrees.

Generally, courts have held that numerosity is satisfied when the class size exceeds forty members. *E.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654-56 (C.D. Cal. 2000); *In re Cooper Cos. Inc. Secs. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009) (citing *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473,

483 (2d Cir. 1995)). Thus, in securities cases, when millions of shares are traded during the proposed class period, a court may infer that the numerosity requirement is satisfied. *Cooper*, 254 F.R.D. at 634; *see also Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975) (numerosity not an issue where the class period encompassed the purchasers involved in 120,000 transactions involving 21,000,000 shares). On average, 4.4 million shares of Agritech stock were sold per week during the class period. (Pl.'s Compl. ¶ 122(c).) Therefore, the Court may safely presume that the class is sufficiently numerous to render it impracticable to join all members.

To demonstrate commonality, a plaintiff must prove that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In their Complaint, Plaintiffs allege common questions of law or fact including whether Defendants violated federal securities law by making misleading or false statements to the public about Agritech's business operations and earnings. Therefore, the Court finds that Plaintiffs have satisfied the commonality requirement.

To demonstrate typicality, a plaintiff must show that "the claims . . . of the representative parties are typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (citation and internal quotations omitted). Here, the action is based on the Defendants' alleged

misrepresentations, which harmed not only the representative Plaintiffs but all class members because they purchased stock based on these misrepresentations. Thus, Defendants' conduct and the injury suffered is the same for all class members. Therefore, the Court finds that Plaintiffs have satisfied the typicality requirement.

To satisfy adequacy, the person representing the class must be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. Pro. 23(a)(4). Adequacy requires (1) that the representative plaintiff does not have a conflict of interest with the proposed class and (2) that the plaintiff is represented by qualified and competent counsel. *Hanlon*, 150 F.3d at 1020. The Court is unaware of any conflict of interest between Plaintiffs and the proposed class. Additionally, Plaintiffs' counsel is competent to represent the class. The record shows that class counsel has significant experience in litigating complex class actions, especially in the area of securities fraud. (Rosen Decl. Ex. 2.) Accordingly, the Court finds that the adequacy requirement is satisfied.

*2. The Requirements of Rule 23(b) Are Not Satisfied*

In addition to satisfying the prerequisites of Rule 23(a), a plaintiff seeking class certification must also satisfy one of three requirements of Rule 23(b). Plaintiff contends this action meets the requirements of Rule 23(b)(3). For the following reasons, the Court disagrees.

Certification is appropriate under Rule 23 "whenever the actual interests of the parties can be served

best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022. A court may certify a class action under Rule 23(b)(3) if it: (1) finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

The predominance requirement asks "whether proposed classes are sufficiently cohesive" by focusing on "the relationship between the common and the individual issues." *In re Wells Fargo Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009). A plaintiff asserting securities fraud under Section 10(b) must prove (1) a material misrepresentation or omission, (2) scienter, (3) a connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) loss causation. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). As discussed above, Defendants' alleged conduct is common to all members of the proposed class. However, the reliance element focuses on the action of each individual plaintiff. Therefore, "the factor that threatens Plaintiffs' ability to survive the predominance inquiry is reliance." *In re Countrywide Fin. Corp. Secs. Litig.*, 273 F.R.D. 586, 607 (C.D. Cal. 2009).

Courts have recognized that where reliance is an element of the cause of action, individual issues of reliance would predominate over common issues and no class would be able to be certified. *Dura Pharms.*, 544 U.S. at 341. In securities litigation, however, courts will presume reliance as to the class where there has been a fraud on the market. *Basic, Inc. v.*

*Levinson*, 485 U.S. 224, 242-43 (1988). This presumption rests on the theory that "investors presumably rely on the market price, which typically reflects the misrepresentation or omission." *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 934 n.12 (9th Cir. 2003). To invoke the fraud-on-the-market presumption of reliance, a plaintiff must establish (1) that the securities were traded in an efficient market and (2) that the defendants' misrepresentations were material and public. *Conn. Retirement Plans & Trust Funds v. Amgen, Inc.*, 660 F.3d 1170, 1172 (9th Cir. 2011). While plaintiffs must establish that the market was efficient and that the misrepresentations were public, materiality need only be plausibly alleged at the class certification stage. *Id.*

The Ninth Circuit uses the *Cammer* factors to determine whether a company's stock was traded on an efficient market. *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (citing to *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989). The *Cammer* factors examine: (1) the average weekly trading volume of the security during the relevant period; (2) the number of securities analysts following the security; (3) the extent to which market makers trade in the security; (4) the company's eligibility to file an SEC Form S3; and (5) the existence of a cause-effect relationship between unexpected corporate news and a change in the price of the security. *Id.* at 1065. The first four factors rely on circumstantial evidence to assess whether the market for the security is conducive to informational efficiency. *Countrywide*, 273 F.R.D. at 613. The fifth factor, instead of "relying on

circumstantial evidence that a security's market is conducive to efficiency . . . explores whether an important result of an efficient market exists." *Id.* at 614. These factors are non-exclusive and meeting all factors is not always necessary. *Id.* at 613 (citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005)). However, several courts have recognized that the fifth factor is the most important. *Id.* at 614.

*i. Plaintiffs Satisfy the First, Third, and Fourth Cammer factors.*

*Cammer* suggests that "[t]urnover by average weekly trading of two percent or more of the outstanding shares would justify a strong presumption that the market for the security is an efficient one; one percent would justify a substantial presumption." *Cammer*, 711 F. Supp. at 1186. Plaintiffs' expert calculates Agritech's average weekly trading volume to be 29.4 percent. (*Id.*) Even if Dr. Werner failed to filter out noise trading in conducting his analysis, his calculation of nearly twenty-five percent average weekly trading volume is well above the one percent required for a presumption that the market is efficient. Therefore, analysis of the first factor supports a finding that Agritech stock was trading on an efficient market.

"Ten market makers for a security would justify a substantial presumption that the market for the security is an efficient one; five market makers would justify a more modest presumption" of efficiency. *Cammer*, 711 F. Supp. at 1293. Dr. Werner concludes that there were six market makers for Agritech stock. (Werner Decl. ¶ 29.) Further, Dr. Feinstein analyzed market maker data provided by

Bloomberg and concluded that at least 290 firms made a market in Agritech common stock, including the six listed by Dr. Werner. (Feinstein Decl. ¶ 38.) Defendants do not dispute this evidence. Therefore, the Court finds that the third factor supports a finding of market efficiency.

A company's ability to file an S-3 Registration Statement with the SEC implies efficiency. Both Dr. Werner and Dr. Feinstein agreed that not only was Agritech able to file an S-3 statement, but that it did file a statement on March 12, 2010. Thus, the fourth factor also supports a finding of efficiency.

*ii. Plaintiffs Fail to Satisfy the Second and Fifth Cammer Factors*

The more securities analysts following and reporting on a company's stock, the greater the likelihood that the stock trading public is relying on the information the company disseminates. *Cammer*, 711 F. Supp. at 1286. Dr. Werner concludes that there were thirteen analysts following Agritech stock and that they collectively issued twenty-eight reports over the class period. (Werner Decl. ¶ 28.) However, Dr. Werner provides no information as to these thirteen analysts. Without such information, the Court cannot make a determination as to whether these individuals were, in fact, analysts. Accordingly, Plaintiffs have failed to meet their burden of proof on this issue and this factor cannot support a finding of market efficiency.

"One of the most convincing ways to demonstrate efficiency [is] to illustrate over time, a cause and effect relationship between company disclosures and

resulting movements in stock price." *Cammer*, 711 F. Supp. at 1291. The most common way to test a causal connection is through conducting event studies, which attempt to determine whether new information correlates with price movement. *Countrywide*, 273 F.R.D. at 614. Causation may be inferred if there is a correlation. *Id.* This inference is stronger under certain circumstances, such as "(1) the more statistically significant the correlation; (2) the more objectively defined the event is; (3) the better the study controls for nonfraud factors; and (4) the larger and more representative the sample." *Id.* Experts on both sides agree that the correlation is statistically significant at a 95% confidence level. Even after acknowledging this, Dr. Werner found market efficiency after conducting an event study where he found correlation at a statistically significant level for only one of four events. Dr. Feinstein conducted two event studies, one using the same four events as Dr. Werner and the other using those four events in addition to three others. Dr. Feinstein's studies found that, in the aggregate, there was a statistically significant level of correlation between Agritech's disclosures and movement in the price of its stock. However, it is unclear how meaningful this finding is, as the level of correlation was measured in the aggregate. Even if the Court weighed evidence from Dr. Feinstein equally to that of Dr. Werner, Plaintiffs' own experts differ in their conclusions. This fact, alone, leads the Court to find that Plaintiffs have not satisfied their burden to show conclusive evidence of a causal relationship between Agritech's disclosures and movement in the price of its stock.

Therefore, the Court finds that the fifth factor does not support a finding of market efficiency.

In weighing the above factors, the Court finds that Plaintiffs are unable to establish that Agritech stock was traded on an efficient market. Because Plaintiffs cannot establish that there was an efficient market, they are unable to rely on the fraud-on-the-market presumption of reliance and the Court need not consider whether any misrepresentations were public or material. Furthermore, without a presumption of reliance, Plaintiffs are unable to establish that questions of law or fact common to class members predominate over any questions affecting only individual members. Therefore, Plaintiffs are unable to meet the requirements of Rule 23(b)(3).

## V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' Motion to Exclude and **DENIES** Plaintiffs' Motion for Class Certification.

**IT IS SO ORDERED.**

* * *

## APPENDIX F

### *Smyth* Amended Complaint

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| KEVIN SMYTH, TE GYUN KIM, PREMIUM ALLIANCE INVESTMENT LIMITED, SANG CHUL HAN, HSP INVESTMENTS LIMITED, SEUNG 110 LEE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,<br><br>Plaintiffs,<br><br>vs.<br><br>CHINA AGRITECH, INC.; YU CHANG; YAU-SING TANG a/k/a GARETH TANG; GENE MICHAEL BENNETT; XIAO RONG TENG; MING FANG ZHU; ZHANG "ANNE" WANG; CHARLES LAW, a/k/a CHARLES C. LAW, CHIEN-LEE C. LOH, CHARLES CHIEN- | No.: CV-13-03008 (RGK) (PJWx)<br><br>AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE FEDERAL SECURITIES LAWS<br><br>CLASS ACTION<br><br>**JURY TRIAL DEMANDED** |

LEF LAW, AND CHARLES CHIEN-LEE LOH; LUN ZHANG DM; AND HAI LIN ZHANG,

Defendants.

1. Plaintiffs Kevin Smyth, Te Gyun Kim, Premium Alliance Investment Limited, Sang Chul Han, HSP investment Limited, and Seung Ho Lee ("Plaintiffs") individually and on behalf of all other persons similarly situated, by their undersigned attorneys, allege in this Amended Complaint (the "Complaint") the following upon knowledge with respect to their own acts, and upon facts obtained through an investigation conducted by their counsel, which included, *inter alia*: (a) review and analysis of relevant filings made by China Agritech, Inc. ("CAGC" or the "Company") with the United States Securities and Exchange Commission (the "SEC"); (b) review and analysis of defendants' public documents, conference calls and press releases; (c) review and analysis of securities analysts' reports and advisories concerning the Company; (d) information readily obtainable on the Internet; (e) interviews of several witnesses with personal knowledge of the relevant facts; (f) investigation of Chinese State Administration of Industry and Commerce ("SAIC") filings; (g) investigation of Chinese State Administration of Taxation ("SAT") filings; and (h) investigation and analysis of companies alleged to be suppliers of the Company.

## I. NATURE OF THE ACTION

2. This is a class action on behalf of a class consisting of all persons and entities, other than defendants and their affiliates, who purchased the publicly traded common stock of CAGC between November 12, 2009 through March 11, 2011 (the "Class Period"), seeking to recover damages caused by defendants' violations of federal securities laws (the "Class.").

3. This Complaint alleges claims for violations of §10(b) and §20(a) of the Securities Exchange Act of 1934 on behalf of all Class members.

4. CAGC is a holding company. Its purported business operations are primarily conducted through its direct and indirect subsidiaries in the People's Republic of China ("PRC"). It purports to manufacture and sell organic compound fertilizers and related agricultural products.

5. During the Class Period, CAGC and its officers and directors engaged in a systemic and wide-ranging scheme that fraudulently created nearly all of CAGC's reported revenue and earnings:

- Overstating revenue by at least 900% for fiscal 2009 and 1,444% for fiscal 2008.
- Reporting $76.13 million of revenue in 2009 and $45.24 million in 2008, when the true revenue figures were not more than $7.6 million in 2009 and $3.0 million in 2008.
- Overstating net income by at least 536% for fiscal 2009. Reporting a profit for fiscal 2008, while the Company was in fact losing money.

- Reporting $6.17 million of net income in 2009 and $9.83 million in 2008, when the true net income figures were not more than $0.97 million in 2009 and a net loss of ($1.88) million in 2008.
- Failing to disclose material related party transactions - CAGC signed a contract effective December 8, 2008 to pay a company controlled by its CEO Chang approximately $4.0 million for raw materials.
- CAGC has maintained two materially different sets of financial accounts, one for investors that it files with the SEC and one for its true business operations that it provides to the Chinese government showing revenue and income only a tiny fraction of that reported to the SEC and investors.

6. During the Class period when CAGC was issuing false and misleading financial statements, Defendants Teng, Tang and Zhu sold over $3.0 million of CAGC stock and CAGC sold over $20.0 million in a public offering.

7. Then on March 14, 2011, CAGC's auditors Ernst & Young Hua Ming ("E & Y") stated that they are not able to rely on management's representations any longer.

8. The same day E &Y's role as auditor was terminated; NASDAQ delisted and halted trading in CAGC's stock "in order to protect the public interest."

9. In the wake of the scandal, nearly all of the

Company's directors and officers have resigned.

10. CAGC has not filed its annual report for 2010 on Form10-K with the SEC, which was originally due on April 15, 2011. Consequently, on October 17, 2012 the SEC issued an enforcement order revoking the registration of CAGC's stock. Thus, CAGC's stock is no longer publicly traded, effectively rendering it worthless. The last trade of CAGC shares prior to the revocation order was at $0.16/share.

11. CAGC's false statements have caused investors substantial losses as its shares have dropped from $10.78/share to nearly zero as a result of defendants' violations of the securities laws.

## II. JURISDICTION AND VENUE

12. The Securities Exchange Act claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. § 78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

13. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331.

14. Venue is proper in this Judicial District pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa), 28 U.S.C. § 1391(b), 28 U.S.C. § 1391(d).

15. In connection with the acts, conduct and other wrongs alleged herein, Defendants either directly or indirectly used the means and instrumentalities of interstate commerce, including but not limited to the United States mails, interstate telephone communi-

cations and the facilities of the national securities exchange.

## III. PARTIES

16. Plaintiffs Kevin Smyth, Te Gyun Kim, Premium Alliance Investment Limited, Sang Chul Han, HSP Investments Limited, and Seung Ho Lee purchased CAGC common stock during the Class Period and have suffered damages as a result. The PSLRA Certifications of the Plaintiffs have previously been filed with the Court and are incorporated herein by reference.

17. Defendant CAGC is a Delaware corporation with its principal executive offices located at Room 3F, No. 11 Building, Zhonghong International Business Garden, Future Business Center, Chaoyang North Road, Chaoyang District, Beijing, China 100024. A CAGC subsidiary maintains an office in California.

18. CAGC, through its subsidiaries, purports to manufacture and sell organic compound fertilizers and related agricultural products in the PRC.

19. To have its stock publicly traded in the United States, CAGC employed a device called a "reverse merger" in 2005. In a reverse merger, a publicly traded shell company acquires the private company seeking to go public. In exchange, the shareholders of the former private company receive a controlling share of the public company.

20. As a result of the reverse merger, CAGC became a holding company that primarily operates through its subsidiaries in the PRC.

21. Defendant Yu Chang ("Chang") was and is the Company's CEO, President, Secretary and Chairman of the Board at all relevant times. In addition, Defendant Chang was a substantial shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and 2009 10-K, Defendant Chang owned 41.96% and 40.23% of the Company's stock, respectively.

22. Defendant Yau-Sing Tang a/k/a Gareth Tang (collectively "Tang") was the Company's CFO and Controller from October 2008 through January 16, 2012—when he suddenly resigned. In addition, Defendant Tang was a shareholder of the Company throughout the Class Period. When the Company filed its 2008 10¬K and 2009 10-K, Defendant Tang owned 1.04% and 0.4% of the Company's stock, respectively.

23. Defendant Gene Michael Bennett ("Bennett") was a director of CAGC from October 2008 through June 7, 2012—when he resigned. At all times during the Class Period, Bennett was the chair of CAGC's audit committee, as well as a member of CAGC's Nominating and Governance Committee. After the CAGC Defendants' fraud was disclosed, Bennett was the head of the Company's Special Committee investigating the allegations of fraud.

24. Bennett has served as an officer and/or director of numerous Chinese reverse merger frauds. Bennett served as a director and CFO of Duoyuan Printing, Inc.—which is the target of an SEC investigation for filing materially false and financial statements.

25. Bennett also served as director of China Shenghuo Pharmaceutical Holdings—a company like Duoyuan, that was subject to civil securities class action lawsuits. According to a March 30, 2011 Bloomberg BusinessWeek article, Bennett's biographies listed in certain SEC filings of companies where he was employed, misstated his qualifications. Contrary to the descriptions, Bennett never worked with the accounting firm of Grant Thornton and he never received a law degree from the University of Michigan. The misstated qualifications appeared in China Pharma Holdings, Inc. ("China Pharma") 2008 and 2009 10-K. Interestingly, China Pharma was represented by defendant Charles Law and his law firm, King and Wood, in connection with its securities' registration, and in 2011 China Pharma had to restate its financial statements for fiscal years 2009 and 2010.

26. Defendant Xiao Rong Teng ("Teng") was and is a director of CAGC at all relevant times. Teng also served as the Company's COO from February 2005 to March 2009. In addition, Teng was a substantial shareholder of the Company throughout the Class Period. When the Company filed its 2008 10-K and 2009 10¬K, Teng owned 2.53% and 2.15% of the Company's stock, respectively.

27. Defendant Ming Fang Zhu ("Zhu") was CAGC's Chief Operating Officer from March 2009 through May 27, 2011- when he resigned. From April 2007 to March 2009, Zhu served as President of Beijing Agritech Fertilizer Co, Ltd., an indirect subsidiary of the Company.

28. Defendant Lun Zhang Dai ("Dai") was and is

a director of CAGC at all relevant times. Dai also serves as a member of the Company's Audit Committee, Compensation Committee and Nominating and Governance Committee. Dai is referred to in CAGC's SEC filings as Lun Zhang Dai and Lunzhang Dai.

29. Defendant Hai Lin Zhang ("Zhang") was a director of CAGC from October 2008 through March 13, 2012—when Zhang resigned. Zhang also served as a member of the Company's Audit Committee, Compensation Committee and Nominating and Governance Committee. Zhang is referred to in CAGC's SEC filings as Hai Lin Zhang and Hailin Zhang.

30. Defendant Charles Law a/k/a Charles C. Law, Chien-Lee C. Loh, Charles Chien-Lee Law, and Charles Chien-Lee Loh. (collectively "Law") was a director of CAGC from January 2010 to February 4, 2011. According to the Company's SEC filings, Law is a qualified U.S. attorney who has an understanding of SEC compliance requirements. Law's law firm, King & Wood represented CAGC in connection with CAGC's initial reverse merger registration. It appears that Law and/or King & Wood have been involved with registration of many Chinese reverse merger companies, including Keyuan Petrochemicals, Inc., which is also the subject of a securities class action, alleging, *inter alia*, accounting improprieties and failure to disclose related party transactions.

31. Defendant Zheng "Anne" Wang ("Wang") was a director of CAGC from December 2009 until March 14, 2011. Wang has been Vice-President of Carlyle Asia Growth Capital, a subsidiary of the Carlyle

Group ("Carlyle"), since December 2007. According to the Company's SEC filings, Wang was Carlyle's designee to CAGC's board and was determined by the Board of Directors not to be an "independent director."

32. Chang, Tang, Bennett, Teng, Zhu, Dai, Zhang, Law, Wang are collectively referred to hereinafter as the "Individual Defendants."

**The Audit Committee**

33. According to the Company's audit committee charter, members of the audit committee have the responsibility to, among other things:

- ".... (a) assists the Board's oversight of (i) the integrity of the Company's financial reporting process and system of internal controls...";
- "Review and discuss with management and the independent auditors, before filing with the Securities and Exchange Commission, the annual audited financial statements and quarterly financial statements. Review with the independent auditors and management the results of the audit and the Company's specific disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations.- Discuss matters required to be communicated to Audit Committee in accordance with Statement on Auditing Standards No. 61."; and
- "With the independent auditors, management and the internal auditors, periodically review and discuss significant (a) financial reporting

> issues and practices, and critical accounting policies and estimates. (b) issues regarding accounting principles and financial statement presentation (including any significant changes in the Company's selection or application of accounting principles). and (c) issues as to the adequacy of the Company's internal control systems and compliance with applicable laws and regulations. Assess management's attitude toward internal controls, the process for establishing and monitoring internal control systems and any special audit steps adopted in light of material control deficiencies."

34. According to CAGC's 2009 10-K, the audit committee was comprised of Defendant Bennett, Dai and Zhang, with Bennett serving as the Chairman. Bennett was also determined by the board of directors to be the necessary audit committee member that qualifies as an "audit committee financial expert".

35. Defendant Bennett, Dai and Zhang as members of the audit committee had an affirmative duty of oversight and responsibility for the integrity of CAGC's financial reporting.

**CAGC's Code of Ethics Acknowledges Related Party Transactions Should be Avoided**

36. The Company's Code of Ethics – which CAGC's officers and directors presumably promised to adhere to - prohibits self-dealing transaction such as those engaged in by defendant CEO Chang:

> "The chief executive officer, chief financial officer, comptroller, chief accounting officer or

persons performing similar functions (collectively, "Senior Financial Officers") hold an important and elevated role in corporate governance. Senior Financial Officers fulfill this responsibility by prescribing and enforcing the policies and procedures employed in the operation of the enterprise's financial organization, and by demonstrating the following:

> I. Honest and Ethical Conduct Senior Financial Officers will exhibit and promote the highest standards of honest and ethical conduct through the establishment and operation of policies and procedures that:
>
> • ....
>
> • **Prohibit and eliminate the appearance or occurrence of conflicts between what is in the best interest of the enterprise and what could result in material personal gain for a member of the financial organization, including Senior Financial Officers.".**

[Emphasis added.]

**Respondeat Superior Liability**

37. CAGC is liable for the acts of the Individual Defendants and its employees under the doctrine of *respondeat superior* and common law principles of agency, as all of the wrongful acts complained of herein were carried out within the scope of their employment with authorization.

38. The *scienter* of the Individual Defendants and other employees and agents of the Company is simi-

larly imputed to CAGC under *respondeat superior* and agency principles.

## IV. DEFENDANTS' MATERIAL OMMISSIONS AND MISREPRESENTATIONS

### A. The 2009 Q3 10-Q is False and Materially Misstated

39. The Class period begins on November 12, 2009 when the Company filed with the SEC its report for the third quarter of 2009 on Form 10-Q ("2009 Q3 10-Q") containing false and misleading financial statements.

40. The false and misleading 10-Q was signed by defendants Chang and Tang. Chang and Tang also signed the accompanying Sarbanes-Oxley ("SOX") certifications, attesting to the accuracy of CAGC's financial statements.

41. The 2009 Q3 10-Q was false because it materially misstated CAGC's revenue and net income for the quarter.

42. According to CAGC's SEC filings, in 2009 CAGC had four operating subsidiaries located in the PRC: Beijing Agritech, Pacific Dragon, Anhui Agritech, and Xinjiang Agritech.

43. Plaintiffs' counsel obtained financial statements filed by the four subsidiaries with both the PRC State Administration for Industry and Commerce ("SAIC")[1] and PRC State Administration of

[1] The SAIC (State Administration for Industry and Commerce) is the Chinese government body that regulates industry and commerce in China. It is primarily responsible for business registrations, issuing and renewing business licenses and acts

Taxation ("SAT") [2].

44. The consolidated financials reported by CAGC with the SAIC and SAT for *entire fiscal year* 2009 are substantially similar to each other, and both report revenue and income that are substantially less than the revenue and income CAGC reported in the 2009 Q3 10-Q with the SEC.

| (In USD Million) | **SEC Nine Months Ended Sept. 30, 2009** | **SAIC for Entire fiscal year 2009** | **SAT for Entire Fiscal Year 2009** |
|---|---|---|---|
| Net Revenue | $55.38 | $7.02 | $7.59 |
| Net Income | $12.83 | $0.97 | $0.93 |

45. The financial statements filed by CAGC with the two PRC government authorities indicate the true financial performance of the Company because.

- Under PRC law, penalties for filing false SAIC filings include fines and revocation of the entity's business license.[3]
- If an entity's business license is revoked, the People's Bank of China[4] requires all bank accounts of that entity be closed.[5]

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as the government supervisor of corporations. All Chinese companies are required to file financial statements with the Chinese government annually or bi-annually.

[2] The SAT (State Administration of Taxation) is PRC equivalent of the Internal Revenue Service in the U.S.

[3] "Measures for the Annual Inspection of Enterprises" issued on February 24, 2006, Article 20.

- Without a business license the entity cannot legally conduct any business.
- The financial statements CAGC filed in the PRC with the SAIC are required by law to be prepared according to PRC GAAP and audited by PRC CPA firms.[6] Agritech Fertilizer Limited's financial statements filed with the SAIC were audited by Beijing Zhonghui Xincheng CPA Firm, and its SAIC annual reports signed by Yu Chang. Pacific Dragon Fertilizer Co., Ltd.'s financial statements were audited by Heilongjiang Huaxin CPA Firm. And its SAIC annual reports signed by Yu Chang. Xinjiang Agritech Agricultural Development Co., Ltd.'s financial statements were audited by Xinjiang Runtong CPA Firm and its SAIC annual reports were signed by Yu Chang. Anhui Agritech Development Co., Ltd.'s financial statements were audited by Bengbu Tianyi CPA Firm and its SAIC annual reports signed by Yu Chang.

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[4] People's Bank of China in PRC is equivalent to the Federal Reserve in the U.S.

[5] "Measures for the Administration of RMB Bank Settlement Accounts" issued in April 2003. (No.5 [2003]), Article 49.

[6] Beijing Agritech's 2008 and 2009 financial statements are audited by Beijing Zhonghui Xincheng CPA Firm. Pacific Dragon's 2008 and 2009 financial statements are audited by Heilongjiang Huaxin CPA Firm. Xinjiang Agritech's 2008 and 2009 financial statements are audited by Xinjiang Runtong CPA Firm. Anhui Agritech's 2008 and 2009 financial statements are audited by Bengbu Tianyi CPA Firm.

- Under PRC law, filing false tax documents is a crime subject to severe criminal and civil penalties, including imprisonment.[7]

46. Additionally, Chinese Generally Accepted Accounting Principles ("PRC GAAP") and U.S. Generally Accepted Accounting Principles ("US GAAP") are substantially the same. In particular for revenue recognition for sales of goods, US GAAP, PRC GAAP and CAGC's stated revenue recognition policy are the same.

47. There are no significant differences between PRC GAAP and US GAAP with respect revenue recognition. Authoritative bodies have specifically noted that there are no differences between PRC GAAP and GAAP.

48. The Committee of European Securities Regulators, in a paper entitled CESR's advice on the equivalence of Chinese, Japanese and US GAAPs (2007), noted that there were no significant differences between US GAAP and International Financial Reporting Standards ("IFRS"). Pg. 25, at 2nd entry on page.

49. There are no significant differences between IFRS and Chinese GAAP on revenue recognition. *Id.* at 35, 6th entry on page. Thus, transitively, there are no significant differences between PRC GAAP or US GAAP on revenue recognition.

50. The law firm K & L Gates LLP has represented to the U.S. Securities & Exchange Commission in

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[7] Article 201 of the Criminal Law of PRC; Article 63 of the Law of PRC Concerning the Administration of Tax Collection.

an October 27, 2010 letter that: "The basic accounting principles and practice of Chinese GAAP are similar to US GAAP. There are no substantial differences between Chinese GAAP and U.S. GAAP."

51. Thus, there are no significant differences between US GAAP and PRC GAAP that can explain the differences in CAGC's SAIC financial statements and those it filed with the SEC.

52. The 2009 Q3 10-Q describes its revenue recognition policy as:

> Revenue Recognition. Our revenue recognition policies are in compliance with Staff Accounting Bulletin 104. Sales revenue is recognized at the date of shipment to customers when a formal arrangement exists, the price is fixed or determinable, the delivery is completed, no other significant obligations of our Company exist and collectibility is reasonably assured. Payments received before all of the relevant criteria for revenue recognition are satisfied are recorded as unearned revenue. Our revenue consists of invoiced value of goods, net of a VAT. No product return or sales discount allowance is made as products delivered and accepted by customers are normally not returnable and sales discounts are normally not granted after products are delivered

53. CAGC's 2009 10-K describes its revenue recognition policy as:

> Sales revenue is recognized at the date of shipment from the Company's facilities to customers when a formal arrangement exists, the price is fixed or determinable, the delivery is completed,

ownership has passed, no other significant obligations of the Company exist and collectibility is reasonably assured.

54. The Chinese accounting standard governing revenue recognition for L&L's PRC subsidiaries, ASBE 14, is similar. It states:

Chapter II Revenue from Selling Goods Article 4. No revenue from selling goods may be recognized unless the following conditions are met simultaneously:

(1) The significant risks and rewards of ownership of the goods have been transferred to the buyer by the enterprise;

(2) The enterprise retains neither continuing management involvement to the degree usually associated with ownership, nor effective control over the goods sold;

(3) The relevant amount of revenue can be measured in a reliable way;

(4) The relevant economic benefits associated with the transaction will flow to the enterprise; and

(5) The relevant costs incurred or to be incurred can be measured in a reliable way.

55. Therefore, CAGC's 2009 Q3 10-Q is false and materially misleading.

**B. CAGC's 2009 10-K is False and Materially Misstated**

56. On April 1, 2010, the Company issued its fiscal 2009 annual report on form 10-K ("2009 10-K")

containing false and misleading financial statements for fiscal years 2008 and 2009.

57. The false and misleading 2009 10-K was signed by defendants Chang, Tang, Teng, Bennett, Dai, Zhang, Law and Wang. Defendants Chang and Tang signed the accompanying SOX certifications, attesting to the accuracy of CAGC's financial statements.

58. The 2009 10-K was false and materially misstated because: i) It materially misstated the Company's revenue and net income for fiscal year 2008 and 2009; and ii) It concealed material related party transactions.

**1. CAGC Kept Two Materially Different Sets of Books: The Financial Statements CAGC Filed with Chinese Authorities Report a Tiny Fraction of the Revenue and Income contained in the Financial Statements CAGC Filed with the SEC**

59. The revenue and net income reported by CAGC with the PRC SAIC and SAT for fiscal 2008 and 2009 are substantially less than those reported by CAGC with the SEC.

60. For fiscal 2008, the Company reported $45.24 million net revenue and $9.83 net income to the SEC. However, the revenue it reported to the PRC SAIC and SAT was no more than $3 million, with a net loss of more than ($1.88) million.

61. CAGC overstated revenue by at least 1,444% for fiscal 2008. It fabricated a profitable fiscal year

for 2008 while the Company was in fact losing money.

| (In USD million) | SEC 2008 | SAIC 2008 | SAT 2008 | Amount of Overstatement from SAIC to SEC | SAIC Amount as % of SEC |
|---|---|---|---|---|---|
| Net Revenue | $45.24 | $2.93 | $2.4 | $42.31 | 6.48% |
| Net Income | $9.83 | ($1.88) | ($2.03) | $11.71 | n/a |

62. For fiscal 2009, the Company reported $76.13 million net revenue and $6.17 net income to the SEC. However, CAGC reported revenue to the PRC SAIC and SAT that was no than $7.6 million, with net income of less than $1 million.

63. CAGC overstated revenue by at least 900% and overstated net income by at least 536% for fiscal 2009.

| (In USD million) | SEC 2008 | SAIC 2008 | SAT 2008 | Amount of Overstatement from SAIC to SEC | SAIC Amount as % of SEC |
|---|---|---|---|---|---|
| Net Revenue | $76.13 | $7.02 | $7.59 | $69.11 | 9.22% |
| Net Income | $6.17 | $0.97 | $0.93 | $5.2 | 15.72% |

64. CAGC's fraudulent revenue reporting has also been verified by Plaintiff's investigators' site visits to CAGC's factories.

65. According to Plaintiffs' investigator, CAGC subsidiary Beijing Agritech is an idle factory with no

significant operation.[8]

- Plaintiffs' investigators visited Beijing Agritech's factory in Pinggu, Beijing on a weekday in early June, 2011. The investigators found no evidence of operations at the factory. The door was locked. They did not see any movement of workers or machines through the window. There were no trucks or vehicles entering or exiting.

- When the investigators inquired to the gatekeepers about meeting with or talking to the sales department, they were refused entry to the factory. Nor would the gatekeepers provide any contact information for factory management. The two gatekeepers said currently no officer or manager was in the factory and no one was expected in the factory for another month and that the gatekeepers were currently the only persons in charge of the whole factory.

- The investigators also visited the local government department that supervises and regulates CAGC's (and that factory's) business. The department is known as the Administrative Committee of Beijing Xinggu Economic Development Zone. This is the government administrative organ that has responsibility for overall management of the economic zone

[8] Though CAGC did not disclose in its SEC filings about annual production of Beijing Agritech, it did confirm in its February 10, 2011 Letter to Shareholders that the factory in Beijing is fully operational.

> in which CAGC's factory resides.[9] Plaintiffs' investigator interviewed Mr. Yin, the director of Investment Invitation Section I under the Administrative Committee, and was told by him that Beijing Agritech rarely has any production. Its gate is locked all the time. The management has refused the Administrative Committee's several requests for routine site visits. Mr. Yin was also told by Beijing Agritech that this factory was not in operation.

66. For Anhui Agritech, CAGC released more than 10 pictures inside the factory in February 2011, in an effort to rebut the negative facts in the LM Report. Those pictures, however, show that the company did not have basic equipment, such as forklifts, necessary for operations. One picture showed that human laborers were used to move the 40kg (88lb.) fertilizer bags manually. Since this factory was reported to manufacture 100,000 tons of granular fertilizer annually, it means 37 workers have to move 2.5 million bags weighing 40kg each year (185 bags/day per person assuming they work 365 days a year), an

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[9] The Administrative Committee's duties include, but are not limited to, planning and overseeing the economic zone's construction and development, investment and business start-ups, coordination between the various departments for serving the business development, and daily supervision of enterprises that are operating in the zone. Thus the committee usually keeps the most comprehensive information of all enterprises operating in the zone.

impossible method of operation.[10]

67. As to Xinjiang Agritech, it was not incorporated until December 2008. According to LM Report, the Xinjiang Agritech plant is actually a warehouse, shared with two other companies and demonstrates no activity.

68. In summary, CAGC materially overstated it production.

69. In addition, financial statements filed by CAGC subsidiary Pacific Dragon with local SAIC show its revenue for 2008 and 2009 was only $76,811 and $85,294, respectively, far less than the purported annual rent stated in SEC filed financial statements in $518,940.

70. It is a common sense that no company would spend six times its revenue for rent expenses.

71. Similarly, the financial statements filed by CAGC subsidiary Anhui Agritech with the local SAIC show its revenue for 2009 was only $77,941, far less than the purported annual rent of $432,900 reported in CAGC's SEC filings.

72. As shown by the discrepancy between the PRC SAIC revenue, income and expenses, CAGC has been keeping two materially different sets of books, one for the PRC authorities and one for the SEC.

**2. Related Party Transactions**

73. The 2009 10-K was false and misleading also

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[10] An educated estimate based on CAGC's total employees and production capacity of each subsidiary. This assumes a bag is moved only once following production.

because it concealed related party transactions with CAGC's CEO Chang.

74. CAGC's third largest supplier - Shenzhen Hongchou Technology Company Ltd. ("Shenzhen Hongchou") was 90% owned by CAGC CEO, President, Secretary and Chairman of the Board Defendant Chang at all relevant times until at least January 5, 2011, when he claims to have transferred his shares to another individual Haibo Li.[11]

75. US GAAP, Statement of Financial Accounting Standards ("SFAS") and SEC regulations required the Company to disclose all material related party transactions.

76. Statement of Financial Accounting Standards ("SFAS") No. 57 and No. 850 provide that a public company's "[f]inancial statements shall include disclosures of material related party transactions." SFAS No. 57 ¶ 2; 850-10-50-1.

77. "Related party transactions" include those between "an enterprise and its principal owners, management, or members of their immediate families" and those between a company and its "affiliates." SFAS No. 57 ¶ 1; 850-10-05-3. "Affiliate" includes any company that is under common control or management with the public company. SFAS No. 57 ¶ 24(a, b); 850-10-20.

78. Disclosures of related party transactions shall

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[11] Perhaps not coincidentally, Ms. Haibo Li's mother is the owner of Harbin Hai Heng Chemical Dist. Co., another principal supplier to CAGC (supplying 17% of CAGC's raw materials).

include (a) the nature of the relationship involved, (b) a description of the transactions for each period for which income statements are presented and such other information necessary to an understanding of the effects of the transactions on the financial statements, (c) the dollar amount of transactions for each of the periods for which income statements are presented, and (d) amounts due from or to related parties as of the date of each balance sheet presented and, if not otherwise apparent, the terms and manner of settlement. SFAS No. 57 ¶ 2; 850-10-50-1.

79. PRC GAAP is substantially the same as GAAP as they both require disclosure in the financial statements of related party transactions. The definition of related parties is the materially the same as SFAS 57. A translated copy of ABSE 36 is attached hereto as Ex. 1.

80. SEC Regulations also require disclosure of related party transactions. SEC Regulation S-K ("Reg. S-K") (together with the General Rules and Regulations under the Securities Act of 1933 ["Securities Act"] and the Exchange Act and the forms under these Acts) states the requirements applicable to the content of the non-financial statement portions of the annual reports on form 10- K, quarterly reports on form 10-Q and proxy statements on from 14A. (See, Reg. SK, §229.10).

81. Reg. S-K at Section 229.404, Item 404, required, at all times during the Class Period, that the Company "[d]escribe any transaction, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, in which the regis-

trant was or is to be a participant and the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest."

82. Reg. S-K required the disclosure of detailed information concerning related party transactions exceeding $120,000, including the names of the "related person" or entity participating in the transaction, and the amounts of the transaction.

83. Reg. S-K Section 229.303, Item 404 (b)(1)(6) also mandates disclosure of any other relationships that the registrant is aware of between the nominee or director and the registrant that are substantially similar in nature and scope to those relationships listed in paragraphs (b)(1) through (5).

84. A "related person" is defined by Reg. S-K as including any director or executive officer of the Company, any nominee for director, or any immediate family member of a director or executive officer of the registrant, or of any nominee for director or any 5% or greater shareholder

85. In its May 14, 2009 10-Q, CAGC attached a contract dated December 8, 2009 between CAGC's subsidiary Pacific Dragon Fertilizer Co., Ltd. and Shenzhen Hongchou in which CAGC's subsidiary promised to purchase 26.9 million RMB ($4.0 million) of raw materials from Shenzhen Hongchou.[12]

86. According to the 2009 10-K, CAGC purchased 15% and 12% of its raw materials from Shenzhen

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[12] The contract is attached and incorporated by reference herein.

Hongchou in fiscal 2009 and 2008.

87. CAGC, however, did not disclose that 90% of Shenzhen Hongchou's shares were owned by CAGC CEO, President, Secretary and Chairman defendant Chang and that the above purchases were related party transactions.

88. Shenzhen Hongchou's SAIC filings show that Chang has owned 90% of its shares since August, 2004, while Ms. Haibo Li owned the remaining 10%.

89. In addition, Haibo Li's sister is a branch manager for Pacific Dragon, the CAGC subsidiary that signed the related party contract with Shenzhen Hongchou.

90. The SAIC filings also show that Shenzhen Hongchou's annual revenue was only $4,822.00 (RMB 33,269.23) in fiscal 2008, substantially less than CAGC's purported purchases from it.

91. Notably, CAGC reported in the 2009 10-K that "We purchase the majority of our raw materials from suppliers located in the PRC and use suppliers that are located in close proximity to our manufacturing facilities, which helps us to contain our cost of revenue." Shenzhen Hongchou, however, is not close to Pacific Dragon Fertilizer Co., Ltd. or to any of CAGC's subsidiaries. The closest CAGC subsidiary to Shenzhen Hongchou is Anhui Agritech, which is more than 1,300 km (808 miles) away. Pacific Dragon is more than 3,000 km (1,864 miles) from Shenzhen Hongchou.

92. The only reason for CAGC to choose Shenzhen Hongchou as its major supplier is to personally

benefit CEO, President, Secretary and Chairman of the Board defendant Chang.

### 3. CAGC's Other Suppliers Raise Serious Questions

93. According to CAGC's 2009 10-K, Beijing Zhongxin Chemical Technology Development Co., ("Beijing Zhongxin") was its largest supplier. CAGC purchased 18% and 33% of its raw materials from it in fiscal years 2009 and 2008, respectively. On December 2, 2008, CAGC's subsidiary Pacific Dragon Fertilizer Co., Ltd. signed a contract to purchase 59.6 million RMB ($8.7 million) of raw materials (fulvic acid) from Beijing Zhongxin.[13]

- After extensive government database searches and website searches in all possible transliterated Chinese names, Plaintiffs' counsel's investigator could not find such company.[14] Plaintiffs believe Beijing Zhongxin does not exist or if it does exist in some form, it is a non-operational shell company.

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[13] The contract is attached and incorporated by reference herein.

[14] LM Report also questioned CAGC's mysterious suppliers because those companies "cannot be found in any directory under possible Chinese names that would correspond to the transliterated names or under the alphabetic names." However, in its response, CAGC still did not disclose the suppliers' Chinese names. It only referred to the link of its SEC filings where only English names were disclosed. It appears defendants did not disclose the Chinese names because one of the suppliers was owned by CEO/Chairman/President Chang and he did not want to be discovered, while the other supplier does not exist.

- If Beijing Zhongxin does exist, it should be an important and well-known player in the market for fertilizer raw materials since it has millions of dollars in annual sales. It is unlikely that CAGC is its only customer. Yet, when Plaintiff's counsel's investigator interviewed managers at Beijing Dahua Fertilizer Co., Ltd. and Beijing Aojia Fertilizer Co., Ltd., two well-known fertilizer manufacturers in Beijing, they stated that they are quite familiar with the industry, but neither of them has ever heard of Beijing Zhongxin.
- Therefore, Plaintiffs' investigator believes that Beijing Zhongxin does not exist and may be a front to siphon funds from CAGC.

94. According to CAGC's 2009 10-K, Harbin Hai Heng Chemical Distribution Co., Ltd., ("Harbin Hai Heng") was its second largest supplier. On December 5, 2008, CAGC's Pacific Dragon subsidiary signed a contract with Harbin Hai Heng to purchase 43.4 million RMB ($6.0 million) of raw materials from Harbin Hai Heng.[15] CAGC purchased 17% and 12% of raw materials from Harbin Hai Heng in fiscal 2009 and 2008, respectively.

- However, Harbin Hai Heng's PRC SAIC records show that this company did not participate in the mandatory annual inspection for fiscal year 2008 and 2009, implying that it has been a non-active business since 2007. Failing to file the annual inspection will not only

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[15] The contract is attached and incorporated by reference herein.

bring substantial penalties, but also the risk of revocation of the entity's business license.[16] Without a business license, a company cannot conduct any business in the PRC or even maintain a bank account.

- Harbin Hai Heng is a shell company. According to a credit report issued by Qingdao Intercredit, a reputable credit reporting agency in China, Harbin Hai Heng has no known phone number, no website, no information obtainable online and no determinable business operations. These facts have also been verified by Plaintiffs' investigator through extensive database searches.

- Furthermore, Harbin Hai Heng is owned by Guirong Yin who is the mother of Ms. Haibo Li, Chang's business partner in Shenzhen Hongchou, the third largest supplier of CAGC -- which was 90% owned by Chang until January 2011 when Chang transferred his 90% interest to Haibo Li. Haibo Li's sister is a branch manager for CAGC subsidiary Pacific Dragon which signed the $4.0 million contract with Shenzhen Hongchou. Defendant CEO Chang's full relationship with the Li family is not yet known, but it is clearly deep.

95. According to CAGC's 2009 10-K, Langfang Tong Chuang Industrial and Trading Company Ltd ("Langfang Tong Chuang") was its fourth largest supplier. CAGC purchased 13% and 11% of its raw

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[16] PRC "Measures for the Annual Inspection of Enterprises" issued on February 24, 2006, Article 19.

materials in 2009 and 2008 year, respectively.

- Langfang Tong Chuang's PRC SAIC records show that this company's business scope is limited to "sales of paper, daily grocery, iron powder, construction materials, steel, auto parts, and plastic products and machining." None of CAGC's reported purchases of nitrogen, phosphorus and kalium or any similar chemical material is included within the scope of allowable business operations.
- According to PRC regulations, a company's registered business scope is determined by its Articles and monitored by local authorities. A company is not allowed to conduct any business beyond the registered scope without amendment to its Articles and SAIC registration, unless specifically approved by the SAIC.[17]
- Langfang Tong Chuang's SAIC records do not show any approval for the manufacture, sale or distribution of raw materials for fertilizer.
- Furthermore, its SAIC filings show that the company's revenue was $208,370 and $216,350 for the fiscal year 2009 and 2008, respectively,[18] substantially less than CAGC's purported purchase from it.

96. There is no plausible legitimate business ex-

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[17] Company Law of the People's Republic of China, Article 11.

[18] Exchange rate for 2008 is RMB 6.9 : USD 1, for 2009 is RMB 6.8 : USD 1.

planation for CAGC's payments to Beijing Zhongxin, Harbin Hai Heng and Langfang Tong Chuang as these three purported suppliers clearly did not provide raw materials to CAGC in the amounts reported by CAGC.

97. Furthermore, because operating capital is very scarce in China, it is not the general business practice to provide suppliers with large cash advances. Yet, CAGC made huge cash advances to its suppliers for the future purchase of raw materials. As of December 31, 2009 and 2008, total cash advances made to the four suppliers amounted to $25.35 million and $10.8 million, respectively.

## V. THE TRUTH ABOUT CAGC'S FINANCIAL STATEMENTS SLOWLY ENTERED THE MARKET THROUGH PIECEMEAL DISCLOSURES AND MATERIALIZED CAUSING THE PRICE OF CAGC STOCK TO DROP

98. On February 3, 2011, the research firm LM Research published a report asserting that China Agritech was a fraud.

99. The Report, asserted that the Company's financial statements were fraudulent. It alleged revenue was overstated and that the company's factory plants are idle.

100. The adverse news disclosed by the LM Report caused the Company's stock to decline from its closing price of $10.78/share on February 2, 2011 to $9.12/share before closing at $9.85/share on February 3, 2011 —a day over day decline of 8.63%.

101. The next day, CAGC vigorously denied the allegations made in the LM report. The response only helped recovery of the stock price by $0.14/share or 1%. Ironically, Charles Law, one of CAGC's Board of Directors, resigned on that day.

102. CAGC continued to deny the allegations of fraud publicly. Yet, as a result of the allegations of fraud, several analyst firms downgraded CAGC, causing a selloff and declines in its share price.

103. On February 7, 2011, analyst firm Brean Murray downgraded CAGC. Also on February 7, 2011, YQV downgraded CAGC to hold and Rodman & Renshaw placed CAGC's rating under review as a result of the allegations of fraud in the LM Report.

104. On February 8, 2011, analyst firm Chardan Capital lowered its price target for CAGC from $8 to $5. And based on a lack of credibility in management rated CAGC a sell.

105. On February 15, 2011 Bronte Capital issued a scathing report presenting additional facts indicating that CAGC was a fraud and could not possibly have produced the revenue it claimed in its financial statements.

106. As a result of the Bronte Capital report, CAGC stock price dropped from $9.21/share on February 5, 2011 to $7.44/share on February 16, 2011 – more than 19% - on extremely heavy volume.

107. A month later, on March 13, 2011, CAGC announced formation of a Special Committee of its Board of Directors ("the Special Committee") to investigate the allegations of fraud made by third par-

ties.

108. The next day CAGC dismissed Ernst & Young Hua Ming as the Company's independent auditor citing the following reasons as disclosed in the 8-K filed on March 13, 2011:

> "On November 13, 2010, China Agritech, Inc. (the "Company") appointed Ernst & Young Hua Ming ("E&Y") as its independent registered public accounting firm. On March 14, 2011, the Company terminated the services of E&Y.
>
> ...On December 15, 2010, E&Y provided a letter to the Audit Committee of the Board of Directors of the Company (the "Audit Committee") describing certain matters that, if not appropriately addressed in a timely manner, may result in audit adjustments, significant deficiencies or material weaknesses and/or delays in meeting the 10-K filing deadline. ... On March 8, 2011, E&Y informed the Audit Committee that it had encountered additional issues and concerns that, in E&Y's view, required additional information and procedures, **including the initiation of an independent investigation, in order to verify certain transactions and balances recorded on the Company's financial statements and records for the year ended December 31, 2010. E&Y also orally advised the Audit Committee that it may not be able to rely on management's representations based on the issues identified E&Y informed the Company that the issues identified in performing their audit may, if further investigated, have adverse implications for the financial state-**

> **ments covering the three quarterly reports filed by the Company on Form 10-Q during 2010**, and advised the Audit Committee to inform the predecessor auditors of the issues identified, so that they can assess the impact on prior financial reports."

[Emphasis added]

109. Thus, CAGC had concealed that E &Y had identified serious problems with its financial statements as early as December 15, 2010 and had informed CAGC's board that an internal investigation was necessary.[19] CAGC had misled investors to believe that the investigation was not connected at all with E&Y's audit and concealed that E &Y had demanded the internal investigation as a result of serious issues with CAGC's financial statements. But CAGC failed to correct the problems with the financial statements, failed to provide verification for certain transactions – prompting **"E&Y ... orally advise[] the Audit Committee that it may not be able to rely on management's representations based on the issues identified."**

110. Thus, the March 14, 2011 press release shocked investors by disclosing that Defendants had concealed that E&Y had insisted that the board commence an investigation and that Defendants had concealed that the failure of CAGC to file its 10-K timely was a result of accounting problems that E& Y had identified back in December 2010 –leading to

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[19] After retaining a law firm and accounting firm to conduct the investigation for more than four months, CAGC has still not disclosed the results of the investigation.

the investigation. Thus, investors learned for the first time that E& Y had identified problems with CAGC's financial statements. This news crushed any remaining credibility CAGC management had because E&Y stated it could not rely on management's representations.

111. Also on March 14, 2011, the Nasdaq delisted and halted trading in CAGC stock with its share price at $6.88/share.

112. Then, Defendant Wang, a member of the Company's Board of Directors, as well as a member of the special committee of the Board of Directors, resigned without a word.

113. On May 20, 2011, CAGC stock opened for trading on the pink sheets at $1.50/share having dropped $5.38/share from its previous pre-halt trading price. CAGC shares traded as low as $1.00/share before closing for trading at $3.80/share. The next trading day, CAGC shares dropped another $0.80/share to $3.00/share on heavy trading.

114. The share price decline on May 20 and 23 was a direct result of the negative news concerning E&Y disclosed on March14, 2011 and the resignation of defendant Wang as a director, who had served as a representative of Carlyle – further eliminating any credibility for CAGC.

115. CAGC shares currently are valued at $1.55/share as of June 21, 2011.

116. Thus investors have seen the value of their shares drop from $10.78/share on February 2, 2011 when the fraud was first disclosed to $1.55/share as

of June 21, 2011 – a loss of $9.23/share.

## VI. ADDITIONAL FACTS SUGGESTIVE OF SCIENTER

### A. Defendants' Stock Sales Demonstrate Scienter

117. Defendants have also profited handsomely from sales of CAGC stock. This demonstrates that defendants had a strong profit motive to inflate the stock price by overstating its financials.

118. CAGC filed a prospectus with the SEC on May 4, 2010 registering for sale large amounts of CAGC stock owned by Defendants. While it is not clear exactly how much stock each defendants sold pursuant to the Registration Statement, Defendants were each motivated, and intended, to sell CAGC stock and earn tens of millions in profits.

119. Scienter is also supported by fact that CAGC was able to conduct an equity offering to take advantage of CAGC stock's artificially inflated price. In May, 2010, CAGC sold over 1.243 million shares of its stock at $16.10/share raising approximately $21 million; along with the exercise of warrants, CAGC raised an additional $10 million.

120. Defendants Teng, Tang and Zhu all profited handsomely from sales of CAGC stock during the period of the fraud. A list of their specific CAGC share sales are as follows.

| Name | Position | Date | Amount | Proceeds |
|---|---|---|---|---|
| Xiaorong Teng | Director/ COO | 13-May-10 | 10,000 | $169,400 |

| | | | | |
|---|---|---|---|---|
| | | 26-May-10 | 10,000 | $127,846 |
| | | 01-Jun-10 | 7,200 | $92,835 |
| | | 23-Jul-10 | 31,900 | $384,921 |
| | | 26-Jul-10 | 20,000 | $251,064 |
| | | 10-Feb-11 | 100 | $1,294 |
| | | 11-Feb-11 | 11,668 | $151,149 |
| | | 12-Feb-11 | 8,232 | $106,856 |
| | | | **TOTAL** | **$1,285,364** |
| | | | | |
| **Yau-Sing Tang** | CFO | 12-May-11 | 10,000 | $153,000 |
| | | 13-May-11 | 5,000 | $83,000 |
| | | 07-Jun-10 | 5,000 | $56,920 |
| | | 02-Aug-10 | 10,000 | $130,000 |
| | | 03-Aug-10 | 10,000 | $140,334 |
| | | 06-Aug-10 | 10,000 | $150,544 |
| | | 29-Dec-10 | 5,000 | $62,500 |
| | | 30-Dec-10 | 5,000 | $65,000 |
| | | 06-Jan-10 | 5,000 | $67,500 |
| | | | **TOTAL** | **$908,798** |
| **Mingfang Zhu** | COO | 18-May-10 | 1,900 | $29,640 |

| | | | | |
|---|---|---|---|---|
| | | 19-May-10 | 28,100 | $363,033 |
| | | 27-May-10 | 20,000 | $260,208 |
| | | 04-Jun-10 | 20,000 | $240,290 |
| | | | TOTAL | $893,172 |

### B. CAGC's Misconduct Was So Serious that NASDAQ Delisted and the Company's Securities from Trading And the SEC Revokes CAGC's Registration

121. CAGC's misconduct was evidently serious enough that on April 12, 2011, it received a letter from NASDAQ stating that:[20]

- "the staff of Nasdaq believes that the continued listing of the Company's securities on Nasdaq is no longer warranted based on public interest concerns and the Company's failure to file its 2010 Form 10-K on time (the "Nasdaq Letter").
- "the staff of Nasdaq believes **that the serious concerns raised by our former auditors, Ernst & Young Hua Ming ("E&Y"), relating to issues surfacing in the audit process rise to the level of a public interest concern**, ... .

122. On October 17, 2012 the SEC issued an order revoking the registration of CAGC's common

[20] CAGC disclosed the letter in its 8-K filed with the SEC on April 18, 2011.

stock "for the protection of investors."

### C. The Revolving Door for CAGC's Auditors

123. CAGC has changed auditors four times in three years. Since 2008, the Company has had four independent auditors.

124. Kabani & Company, Inc., ("Kabani") a Los Angeles-based accountancy, audited the Company's 2007 financials. Kabani was the accountancy that audited the notoriously fraudulent Bodisen Biotech, an organic fertilizer company that was delisted in 2007, and China Green Agriculture (CGA), a firm which was also disclosed having falsely reported its results to U.S. investors.

125. In April 2008, CAGC terminated Kabani and retained Crowe Horwath LLP as its auditor. CAGC then terminated Crowe Horwath and retained E&Y in November, 2010.

126. However, CAGC fired E&Y four months later due after E&Y identified issues in the 2009 audit, and stated it could no longer rely on representations of CAGC management.

127. On April 12, 2011, CAGC announced it had hired Simon & Edward LLP as its new independent auditor to replace E & Y. Still, CAGC has not produced audited financial statements for fiscal year 2010.

### D. The SEC has Warned of Reverse Merger Companies Such as CAGC

128. Chinese reverse mergers have been a magnet for disreputable stock promoters, leading the SEC to issue warnings about investing in companies

like CAGC.

129. Shielded by the geographic distance of thousands of miles and operating under a regulatory framework that is a world apart from the SEC's oversight, RCM companies have few incentives to provide complete and accurate disclosures to American investors. An August 28, 2010 article in *Barron's* by Bill Alpert and Leslie P. Norton entitled, "Beware This Chinese Export," discusses the enforcement problems that American regulators face when dealing with Chinese companies that trade on U.S. exchanges through RCMs. The article states that "[t]he SEC's enforcement staff can't subpoena evidence of any fraudulent activities in China, and Chinese regulators have little incentive to monitor shares sold only in the U.S."

130. U.S. regulators have finally begun to take notice of the manipulation and fraud endemic in RCMs. The SEC has recently established a task force to investigate investors' claims regarding the impropriety and fraud of RCMs trading on the U.S. markets. SEC Commissioner Luis A. Aguilar (the "Commissioner") discussed Chinese reverse mergers and the process of "backdoor registration," stating:[21]

> In the world of backdoor registrations to gain entry into the U.S. public market, the use by Chinese companies has raised some unique issues, even compared to mergers by U.S. companies. Two important ones are:

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[21] Text of the entire speech is available at http://sec.gov/news/speech/2011/spch040411laa.htm#P7943025.

- First, there appear to be **systematic concerns with the quality of the auditing and financial reporting; and**

- Second, even though these companies are registered here in the U.S., there are **limitations on the ability to enforce the securities laws, and for investors to recover their losses when disclosures are found to be untrue, or even fraudulent.**

**I am worried by the systematic concerns surrounding the quality of the financial reporting by these companies**. In particular, according to a recent report by the staff of the Public Company Accounting Oversight Board (PCAOB), U.S. auditing firms may be issuing audit opinions on the financials, but not engaging in any of their own work. Instead, the U.S. firm may be issuing an opinion based almost entirely on work performed by Chinese audit firms. If this is true, it could appear that the U.S. audit firms are simply selling their name and PCAOB-registered status because they are not engaging in independent activity to confirm that the work they are relying on is of high quality. This is significant for a lot of reasons, including that the PCAOB has been prevented from inspecting audit firms in China.

131. On June 9, 2011, the SEC issued an Investor Bulletin warning investors about investing in companies that enter U.S. markets through RCM "...there have been instances of fraud and other abuses involving reverse merger companies." "Given the potential risks, investors should be especially

careful when considering investing in the stock of reverse merger companies," said Lori J. Schock, Director of the SEC's Office of Investor Education and Advocacy.

## VII. PLAINTIFFS' CLASS ACTION ALLEGATIONS

132. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of a Class consisting of all persons who purchased the common stock of CAGC during the Class Period and who were damaged thereby. Excluded from the Class are Defendants, the present and former officers and directors of CAGC and any subsidiary thereof, members of any defendants' immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

133. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, CAGC's stock was actively traded on the NASDAQ at all times during the Class Period.

134. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are at least hundreds, if not thousands, of members in the proposed Class. Members of the Class may be identified from records maintained by CAGC or its transfer agent and may be notified of the pendency of this action by mail, using a form of notice customarily used in securities class actions.

135. Plaintiffs' claims are typical of the claims of the members of the Class, as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

136. Plaintiffs will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation.

137. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

- whether the federal securities laws were violated by Defendants' acts as alleged herein;
- whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the business, and financial performance of CAGC; and
- to what extent the members of the Class have sustained damages and the proper measure of damages.

138. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to redress individually the wrongs done to them. There

will be no difficulty in the management of this action as a class action.

## VIII. RELIANCE PRESUMPTION FRAUD ON THE MARKET

139. Plaintiffs are permitted a presumption of reliance because CAGC stock was traded in an efficient market during the Class Period. At all relevant times, the market for CAGC common stock was an efficient market for the following reasons, among others:

- CAGC stock met the requirements for listing, and was listed and actively traded on the on the NASDAQ market (under ticker symbol "CAGC"), a highly efficient and automated market;
- On average there were 19.3 million shares of the Company's common stock issued and outstanding during the Class Period. The public float (shares not held by insiders/defendants) was 11.8 million shares on average during the Class Period;
- During the class period, on average, 4.5 million shares of CAGC common stock were traded on a weekly basis. Approximately 38% of the public float, and 23% of all outstanding shares, were bought and sold on a weekly basis, demonstrating a very strong presumption of an efficient market;
- As a regulated issuer CAGC filed with the SEC periodic public reports and was eligible (and did file) S-3 registration statements with

the SEC during the Class Period (February 9, 2010, May 12, 2010, April 16, 2010, and October 19, 2010);

- CAGC conducted a $20 million offering of shares during the Class Period, which attracted media coverage and investor interest;
- CAGC regularly communicated with public investors via established market communication mechanisms, including regular disseminations of press releases on the national circuits of major newswire services and other wide-ranging public disclosures, such as communications with the financial press and other similar reporting service;
- There were more than 2,100 news stories, and analyst reports, and other media coverage regarding CAGC during the Class Period;
- CAGC was followed by several securities analysts employed by major brokerage firms including Brean Murray, Rodman and Renshaw, LM Research, Bronte Capital, and Chardan Capital (among others), who wrote reports that were distributed to the sales force and certain customers of their respective brokerage firms during the Class Period. There were at least 125 investment reports published by analysts and others during the Class Period, which disseminated information about CAGC to investors;
- On average 28 NASD member firms were active market-makers in CAGC stock at all times during the Class Period;

- Unexpected material news about CAGC was rapidly reflected in and incorporated into the Company's stock price during the Class Period; and
- There is a strong statistically significant cause and effect relationship between the release of new company specific information and changes in CAGC's stock price. For example:
  - On December 23, 2009, CAGC disclosed that it had achieved its 2009 sales target of 80,000 metric tons of organic granular fertilizer. This positive news caused an increase in CAGC's stock price of $2.12/share. The CAGC stock-price increase was statistically significant at the 99% confidence level.
  - On February 8, 2010, CAGC released FY10 revenue guidance of approximately $114M vs. consensus estimates of $69.46M. This positive news caused an increase of CAGC's stock price of $1.20/share. The CAGC stock-price increase was statistically significant at the 95% confidence level.
  - On August 12, 2010, CAGC announced earnings per share for the second quarter 2010 that exceeded the analyst consensus estimate. This positive news caused an increase of CAGC's stock price of $2.97/share. The CAGC stock-price increase was statistically significant at the 99% confidence level.

- On September 8, 2010, an analyst downgraded shares of CAGC from Neutral to Sell. This negative news caused a decrease of CAGC's stock price of $2.59/share. CAGC's stock-price decrease was statistically significant at the 99% confidence level.
- On November 10, 2010, CAGC announced earnings per share that missed the analyst consensus estimate. This negative news caused CAGC's stock price to decrease $3.26/share. CAGC's stock-price decrease was statistically significant at the 99% confidence level

***AFFFILIATED UTE***

140. With respect to defendants failure to disclose material related party transactions, plaintiffs are permitted a presumption of reliance under the U.S. Supreme Court's decision in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered the omitted related party transactions important in deciding whether to purchase CAGC stock.

141. Here, Plaintiffs need not prove that they relied on defendants' material omission of the related party transactions in purchasing CAGC stock, because under *Affiliated Ute*, the related party transactions are material facts, a plaintiffs are entitled to a presumption of reliance.

## IX. FIRST CAUSE OF ACTION

**Violation of Section 10(b) of The Exchange Act Against and Rule 10b-5 Promulgated Thereunder Against All Defendants**

142. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

143. This cause of action is asserted against all Defendants.

144. During the Class Period, defendants carried out a plan, scheme and course of conduct which was intended to, and throughout the Class Period, did: (1) deceive the investing public, including Plaintiffs and other Class members, as alleged herein; and (2) cause Plaintiffs and other members of the Class to purchase and/or sell CAGC's securities at artificially inflated and distorted prices. In furtherance of this unlawful scheme, plan and course of conduct, defendants, individually and as a group, took the actions set forth herein.

145. Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business, operations and future prospects of CAGC as specified herein.

146. Defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of CAGC's value and performance and continued substantial growth,

which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about CAGC and its business operations and financial condition in light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business that operated as a fraud and deceit upon the purchasers CAGC securities during the Class Period.

147. Each of the defendants' primary liability, and controlling person liability, arises from the following: (a) defendants were high-level executives, directors, and/or agents at the Company during the Class Period and members of the Company's management team or had control thereof; (b) by virtue of their responsibilities and activities as senior officers and/or directors of the Company, were privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; (c) defendants enjoyed significant personal contact and familiarity with the other members of the Company's management team, internal reports and other data and information about the Company's finances, operations, and (d) defendants were aware of the Company's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

148. Defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for

the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing CAGC's financial condition from the investing public and supporting the artificially inflated price of its securities. As demonstrated by defendants' false and misleading statements during the Class Period, defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by failing to take steps necessary to discover whether those statements were false or misleading.

149. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price for CAGC's securities was artificially inflated during the Class Period.

150. In ignorance of the fact that market prices of CAGC's publicly-traded securities were artificially inflated or distorted, and relying directly or indirectly on the false and misleading statements made by defendants, or upon the integrity of the market in which the Company's securities trade, and/or on the absence of material adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, Plaintiffs and the other members of the Class acquired CAGC's securities during the Class Period at artificially high prices and were damaged thereby.

151. At the time of said misrepresentations and

omissions, Plaintiffs and other members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiffs and the other members of the Class and the marketplace known the truth regarding CAGC's financial results and condition, which were not disclosed by defendants, Plaintiffs and other members of the Class would not have purchased or otherwise acquired CAGC securities, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices or distorted prices at which they did.

152. By virtue of the foregoing, the defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

153. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiffs and the other members of the Class suffered damages in connection with their respective purchases and sales of the Company's securities during the Class Period.

154. This action was filed within two years of discovery of the fraud and within five years of Plaintiffs' purchases of securities giving rise to the cause of action.

## X. SECOND CAUSE OF ACTION

### Violation of Section 20(a) of The Exchange Act Against the Individual Defendants

155. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

156. This Second Claim is asserted against each of the Individual Defendants.

157. The Individual Defendants, acted as controlling persons of CAGC within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, agency, and their ownership and contractual rights, participation in and/or awareness of the Company's operations and/or intimate knowledge of aspects of the Company's revenues and earnings and dissemination of information to the investing public, the Individual Defendants had the power to influence and control, and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements that Plaintiffs contend are false and misleading. The Individual Defendants were provided with or had unlimited access to copies of the Company's reports, press releases, public filings and other statements alleged by Plaintiffs to be misleading prior to and/or shortly after these statements were issued, and had the ability to prevent the issuance of the statements or to cause the statements to be corrected.

158. In particular, each of these Defendants had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

159. As set forth above, CAGC and the Individual Defendants each violated Section 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint.

160. By virtue of their positions as controlling persons, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act as they culpably participated in the fraud alleged herein. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs and other members of the Class suffered damages in connection with their purchases of the Company's common stock during the Class Period.

161. This action was filed within two years of discovery of the fraud and within five years of Plaintiffs' purchases of securities giving rise to the cause of action.

## XI. JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

**WHEREFORE**, Plaintiffs pray for relief and judgment, as follows:

- Determining that this action is a proper class action and certifying Plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as Class Counsel;
- Awarding compensatory damages in favor of Plaintiffs and the other Class members against all Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;
- Awarding Plaintiffs and the Class their reasonable costs and expenses incurred in this action; and

- Such other and further relief as the Court may deem just and proper.

Dated: July 18, 2013

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

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## APPENDIX G

**Decision Denying Class Certification in *Smyth***

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES - GENERAL**

| | | | |
|---|---|---|---|
| Case No. | CV 13-03008-RGK (PJWx) | Date | September 26, 2013 |
| Title | SMYTH et al. v. CHINA AGRITECH, INC. et al. | | |
| Present: The Honorable | R. GARY KLAUSNER, U.S. DISTRICT JUDGE | | |

* * *

## I. INTRODUCTION

On July 18, 2013, investor Kevin Smyth and a group consisting of Te Gyun Kim, Premium Alliance Investment Limited, San Chul Han, HSP Investment Limited, and Seung Ho Lee ("Kim Group") (collectively "Plaintiffs") filed an Amended Class Action Complaint ("Amended Complaint") against China Agritech, Inc. ("Agritech") and present and former members of the company's executive management team and board of directors ("Individual Defendants") (collectively "Defendants"). Plaintiffs allege violations of: (1) Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Securities and Exchange Commission Rule 10b-5 against Defend-

ants; and (2) Section 20(a) of the 1934 Act against Individual Defendants. The Amended Complaint is substantially similar to the complaint filed in this Court in *Dean v. China Agritech, Inc.*, CV 11-01331 RGK (PJW), which the Court dismissed on September 20, 2012 following a settlement by the named parties. Kim Group had earlier signed a lead plaintiff certification in Dean, but did not seek appointment as lead plaintiff until December 7, 2012, in *Smyth*. This action was transferred from the District of Delaware on April 19, 2013.

On December 7, 2012, Victor van de Reijt Holding BV, a third party, filed a motion in the District of Delaware for Appointment as Lead Plaintiff. That day, Plaintiff Kim Group also filed a Motion for Appointment as Lead Plaintiff. On August 5, 2013, Plaintiff Kim Group filed a Motion for Class Certification. On the same date, Defendant Agritech filed a Motion to Dismiss the Amended Complaint and a Motion to Strike the Class Allegations. Presently before the Court are the Motions for Appointment as Lead Plaintiff, Plaintiff Kim Group's Motion for Class Certification, and Defendant Agritech's Motion to Strike Class Allegations.

For the following reasons, the Court **DENIES** without prejudice both Motions for Appointment as Lead Plaintiff. The Court **DENIES** Plaintiff Kim Group's Motion for Class Certification. In light of the above, the Court removes Defendant's Motion to Strike Class Allegations from the calendar.

## II. FACTUAL BACKGROUND

Plaintiffs are investors who purchased Agritech common stock between November 12, 2009 and March 11, 2011 ("Class Period"). Agritech is a holding company incorporated in the State of Delaware, with its principal place of business in Beijing, China. Agritech purports to manufacture and sell organic compound fertilizers and related agricultural products. Plaintiffs claim they purchased Agritech stock on the basis of revenue and net-income figures for the years 2008 and 2009. They assert that the net-income figures Agritech declared in mandatory filings with the Securities and Exchange Commission ("SEC") were false and fraudulent, and that Agritech substantiated these filings with false versions of audit certifications required under the Sarbanes-Oxley Act of 2002. Plaintiffs further claim that:

- Agritech overstated fiscal-year 2009 revenues by 900 percent and net income by 536 percent.
- Defendants maintained separate sets of financial records, reporting one set of figures to the SEC and another, generally less favorable set to the corresponding Chinese regulatory authority.
- Agritech engaged in at least one related-party transaction, purchasing significant quantities of supplies from a company that was 90 percent owned by Agritech's chief executive officer, Individual Defendant Yu Chang.

A series of negative analyst reports appeared in the media beginning on February 3, 2011, questioning Agritech's financial statements and its methods of operation. Subsequently, Agritech's share price fell from $10.78 at the beginning of the Class Period

to $6.88 on March 14, 2011, three days after the Class Period ended, when NASDAQ halted trading of Agritech common stock. By June 21, 2011, the share price for the delisted stock had declined to $1.55. Plaintiffs claim they sustained millions of dollars in losses as a result.

The Court considered a similar complaint in *Dean v. Agritech, Inc.* In that case, the Court denied Defendants' Motion to Dismiss on grounds that the *Dean* plaintiffs had adequately alleged a claim to relief. After the Court denied the *Dean* plaintiffs' Motion for Class Certification, the *Dean* parties settled.

## III. JUDICIAL STANDARD

### A. Motion for Class Certification

A plaintiff seeking class certification bears the burden of demonstrating that it has met all of the requirements for a class action under Federal Rules of Civil Procedure 23(a) and 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The Supreme Court has observed that Rule 23 "does not set forth a mere pleading standard" but requires an affirmative demonstration of compliance with the Rule's requirements. *Id.* Thus, the plaintiff must offer facts supporting each requirement, and the trial court may certify a class only after a "rigorous analysis." *Id.* Some courts equate this standard of analysis with the "preponderance of the evidence" standard. *See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

Rule 23(a) permits one or more members of a class to sue as representative parties on behalf of a

class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). These threshold requirements are also known as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

In addition to meeting the threshold requirements of Rule 23(a), a plaintiff must also satisfy at least one of the three requirements of Rule 23(b). Rule 23(b) provides that a class action may be maintained where: (1) prosecuting separate actions would create a risk of (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other class members who are not parties to those adjudications; (2) the party opposing the class has refused to act on grounds that apply generally to the class; or (3) the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b).

**B. Motion to Strike**

Federal Rule of Civil Procedure 12(f) provides that "the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." When considering a

motion to strike, the court must view the challenged pleading in "the light more favorable to the pleader." *Clark v. State Farm Mut. Auto Ins. Co.*, 231 F.R.D. 405, 406 (C.D. Cal. 2005). The pleading will not be stricken unless it "can have no possible bearing upon the subject matter of the litigation." *Id.* (quoting *Cal. Dept. of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)). Moreover, a motion to strike under Rule 12(f) is an inappropriate mechanism for dismissing "some or all of a pleading." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010). A party seeking such a determination should instead file a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. *Id.* Unless and until a court has determined that a class cannot be certified, even conclusory class allegations will survive a motion to strike. *See Clark*, 231 F.R.D. at 407 (where class allegations address each of the elements of Rule 23(a), relate to the subject matter of the litigation, and satisfy the requirements of Rule 12(f), even conclusory statements will suffice to defeat a motion to strike).

Federal Rule of Civil Procedure 23(d)(1)(D) provides an alternative vehicle for amending class allegations. The Rule provides that in putative class actions, courts may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). The advisory committee notes to the rule's predecessor, Rule 23(d)(4), suggest that striking class allegations is proper only after the court has determined that class treatment is fundamentally inappropriate. *See* 28 U.S.C. App., 7767 ("A negative determination [on

class certification] means that the action should be stripped of its character as a class action."); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 183 n.6 (1974) (Douglas, J., dissenting in part, citing advisory committee note). Thus, as with Rule 12(f), a Motion to Strike under Rule 23(d)(1)(D) is premature if the Court has not yet determined that class certification will never be possible or appropriate.

## IV. DISCUSSION

### A. Class Certification

Plaintiffs contend that they have met all the requirements for class certification. For the reasons outlined below, the Court finds that Kim Group has failed to satisfy the typicality and adequacy prerequisites of Rule 23(a). As a result, the Court need not determine whether Kim Group has also satisfied one of the three requirements of Rule 23(b). Accordingly, the Court denies Plaintiff Kim Group's Motion for Class Certification.

#### *1. Kim Group Fails to Satisfy the Prerequisites of Rule 23(a)*

For the Court to grant a motion for class certification, Plaintiffs must demonstrate that they satisfy Rule 23(a)'s four requirements: (1) numerosity, (2) commonality; (3) typicality; and (4) adequacy of representation. *Wal-Mart Stores*, 131 S. Ct. at 2548. The parties do not dispute that Kim Group satisfies the numerosity and commonality requirements. Defendant argues, however, that Kim Group has failed to offer facts sufficient to show either typicality or adequacy. Specifically, it asserts that Kim Group (1) is subject to unique defenses that render it atypical of

the class; and (2), has not demonstrated that it will vigorously prosecute this case on behalf of the class. The Court agrees and considers typicality and adequacy in turn.

*i. Kim Group Has Failed to Establish Its Typicality Because It May Be Subject to a Unique Claim Preclusion Defense*

A class representative may satisfy the typicality requirement if its claims or defenses are similar to those of the class, even if they are not identical. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-20 (9th Cir. 1998). Typicality "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataprod. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)). A proposed class representative's motion for class certification should not be granted "if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." Id. The typicality inquiry "does not demand proof that a unique defense will ultimately defeat the class representative's claims. Instead, it asks only whether plaintiff is likely to be preoccupied with litigating the defense to the detriment of the class as a whole." *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 537 (C.D. Cal. 2012). *See also J. H. Cohn & Co. v. Am. Appraisal Assoc., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) ("[E]ven an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as

bring into question the adequacy of the named plaintiff's representation.").

Defendant argues that Kim Group's prior relationship with the Dean plaintiffs may subject them to unique defenses, such as claim preclusion, that defeat typicality. Kim Group has failed to persuade the Court that unique defenses will not be a major focus of the litigation.

The claim preclusion doctrine acts to prevent the repeated litigation of a claim once a final judgment has been entered. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). As a general rule, the doctrine applies against parties to earlier actions, and does not preclude a nonparty to an earlier suit from bringing the same or a similar claim. *Id.* at 892-93. However, the Supreme Court has identified several exceptions to the general rule. Most relevant here, a nonparty may be bound by a judgment "if she 'assume[d] control' over the litigation in which that judgment was rendered." *Id.* at 895. Similarly, a named party bound by a judgment "may not avoid its preclusive force by relitigating through a proxy." *Id.* at 895. Thus, in this case, Kim Group may be bound by the *Dean* settlement—and by the Court's denial of class certification in that earlier case—if it "assumed control" over the *Dean* litigation. Likewise, the *Dean* plaintiffs may not avoid the preclusive force of the earlier settlement and judgment by relitigating through a proxy—on Defendant's theory, the Kim Group.

Defendant may be able to raise a claim preclusion defense on the basis that Kim Group, though a nonparty in *Dean*, controlled the earlier litigation. It is clear that the Kim Group was at least aware of, and

willing to participate in, the *Dean* litigation in 2011. The Kim Group signed Lead Plaintiff Certifications in connection with *Dean* but only submitted them in connection with this litigation. (Aronson Decl., Ex. 3.) The Kim Group constituents assert in each of these documents that they "have reviewed the complaint against [Agritech]" and that they are "willing to serve" as lead plaintiffs. (*See, e.g.*, Aronson Decl., Ex. 3, "Te Gyun Kim Lead Plaintiff Certification" at ¶¶ 1, 3.) Because these certifications were filed in 2011, it is likely that the complaint that the Kim Group asserted it had read was the *Dean* complaint. The evidence that the Kim Group was aware of, and willing to participate in, the *Dean* litigation lends some preliminary factual support to Defendant's claim that Kim Group may be subject to a unique preclusion defense.

Other evidence provides additional support for Defendant's contention. As Defendant notes, the Amended Complaints in both cases contain several identically described findings by the same anonymous investigator. (*See, e.g.*, Pl.'s Am. Compl. at 14, *Dean et al. v. China Agritech, et al.*, No. 2:11-cv-01331-RGK-PJW (C.D. Cal. 2012) ("According to Plaintiffs' investigator, [Agritech] subsidiary Beijing Agritech is an idle factory with no significant operation."); *Smyth* Amended Complaint at 16 (identical statement).) Significantly, the Kim Group acknowledges that this investigator is its "agent." (Pl.'s Mem. in Opp'n to China Agritech's Mot. to Dismiss at 17 ("... the investigator, retained by Plaintiff's counsel, is the plaintiff's agent.") Under common law principles, the sine qua non of agency is control. *See* Restatement (Third) of Agency § 1.01 (2006) ("Agency is

the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act"). If the anonymous investigator from both cases was subject to the joint control of both the *Dean* plaintiffs and the Kim Group, it raises legitimate questions about whether the two sets of plaintiffs shared control of other aspects of the *Dean* litigation. As *Taylor v. Sturgell* suggests, if the Kim Group exercised control over the earlier litigation, that control may preclude it from litigating claims against the Defendants in this case.

The evidence of shared control of the same anonymous investigator points to another possible theory of claim preclusion. On this second theory, the *Dean* plaintiffs, acting as principals of the Kim Group, may be seeking to relitigate their claims by using Kim Group as a proxy. In support of this theory, Defendant claims Kim Group based its class allegations partly on documents Defendants supplied during discovery in *Dean*, which the *Dean* plaintiffs never returned as required by their settlement. (Opposition at 6; *see also* Settlement Agreement at 5, *Dean v. China Agritech, et al.*, No. 2:11-cv-01331-RGK-PJW (C.D. Cal. 2012) ("*Dean* Settlement").) Thus, Defendant asserts, Kim Group may be acting as the Dean plaintiffs' proxy, and its claims would be precluded under Taylor.

Plaintiff Kim Group has not produced any facts that tend to rebut Defendant's contention that Kim Group is subject to a unique claim preclusion de-

fense. Instead, Defendant raises two legal arguments in opposition.

First, Plaintiff argues that *Taylor* is inapposite because Kim Group was not a named plaintiff in *Dean*. It is true that the Supreme Court has not specified "the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case." *Taylor*, 553 U.S. at 906. And Plaintiff correctly notes that the Supreme Court has emphasized that a "mere whiff of tactical maneuvering will not suffice," and a defendant bears the ultimate burden of pleading and proving a claim-preclusion defense. *Id.* at 906-07. However, as described above, preclusion is appropriate "when a nonparty later brings suit as an agent for a party who is bound by a judgment." *Id.* at 895. A nonparty may also be bound by a judgment "if she 'assume[d] control' over the litigation in which that judgment was rendered." *Id.* Defendant's contentions about Kim Group fit squarely within these two exceptions to the general rule that only parties to a judgment are bound by it.

Second, Plaintiff argues that Defendant's allegations of collusion are purely speculative and that "a disabling unique defense cannot be manufactured on speculation." (Pl.'s Reply Mem. in Supp. of Mot. for Class Certification at 5 ("Reply").) Contrary to Plaintiff's argument, Defendant has pointed to facts that are consistent with a defense of claim preclusion, without engaging in any discovery in this case. Moreover, whether Defendant will ultimately prevail on its preclusion defense is not at issue at this juncture. What is at issue is Kim Group's ability to vig-

orously prosecute this action on behalf of the class while responding to defenses that do not apply to the broader class. At the class certification stage defendants do not bear the burden of producing facts that establish their unique defenses; it is enough to show that the named plaintiff is "likely to be preoccupied" with litigating the defense. *Cholakyan*, 281 F.R.D. at 537. The burden of persuading the Court that the defenses will not preoccupy the class representatives to the detriment of the class falls squarely on Plaintiffs, and they have offered nothing more than conclusory statements to rebut Defendant's claims of unique defenses.

In certifying a class, the Court must satisfy itself after a "rigorous analysis" that the party seeking class certification satisfies all of Rule 23(a)'s requirements. *Wal-Mart Stores*, 131 S. Ct. At 2551-52. The Kim Group has failed to persuade the Court that unique defenses would not be a major focus of the litigation if it was a class representative.

*ii. Plaintiffs Have Failed to Establish Adequacy of Representation*

In order to satisfy Rule 23(a)'s adequacy requirement, named plaintiffs and their counsel must not have conflicts of interest with other class members and must be able to prosecute the action vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. The class representative must satisfy the adequacy requirement because unnamed parties to the litigation will be bound by any judgment, and due process is served only if the class representative is capable of protecting the absent class members' interests. *Crawford v. Honig*, 37 F.3d 485, 487 (9th

Cir. 1994). The plaintiff bears "the burden of showing facts that support a finding of adequacy." *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 397 (C.D. Cal. 2008). "Class representatives, and not lawyers, must direct and control the litigation." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001). *See also* S. Rep. No. 104-98 at *6 (1995) (in proposing PSLRA, Congress sought "to empower investors so that they, not their lawyers, control securities litigation.").

This Court harbors concerns about the adequacy of Kim Group and its counsel, the Rosen Law Firm. Plaintiff has not shown that Kim Group is willing to vigorously prosecute this action, and there are troubling, unanswered questions about the extent to which the Rosen Law Firm, rather than its clients, is directing this action. The Court also has concerns about whether the Rosen Law Firm is capable of adequately representing the interests of absent class members.

To satisfy the adequacy requirement, Kim Group must be willing and able to prosecute this action vigorously on behalf of the class. *See Hanlon*, 150 F.3d at 1020. The only evidence bearing on Kim Group's willingness to even participate in this action is the lead plaintiff certifications signed in connection with *Dean*. It is unclear—and Kim Group does not say—how the certifications its members signed twenty-nine months ago in connection with a different case affirmatively demonstrate a present willingness and ability to vigorously litigate this action. (Opposition at 19; *see also* Decl. of Brian D. Long in Supp. of Mot. of Kim Group to Appoint Lead Pl., Ex. 2, *Smyth v.*

*Yu Chang, et al.*, No. 1:12-cv-01262-RGA (D. Del. Dec. 7, 2012)). In response to this concern, Plaintiff purported to attach new declarations to its Reply "evidencing their awareness of this action and awareness of their roles as a representative party." (Reply at 4.) A footnote *in the very same Reply* admits the Rosen Law Firm could not obtain new declarations because the members of the Kim Group were "unavailable." (Reply at 4, n.4.) This anecdote alone gives the Court reason to wonder just how involved the Kim Group is in the prosecution of this action. The Rosen Law Firm's apparent inability to contact its clients also casts doubt on the firm's adequacy as class counsel.

Other troubling facts raise questions about whether the Rosen Firm can adequately represent the interests of absent class members. Defendant correctly notes that ten months after filing *Smyth* in Delaware, Plaintiffs had served only one defendant: Agritech. (Opposition at 12.) Only after the Court issued two Orders to Show Cause did Plaintiffs belatedly move for leave to serve notice on the nine defendants domiciled abroad by serving notice on their counsel in the United States—a motion this Court denied on August 21, 2013. At best, this shows a lack of engagement on the part of both Kim Group and their counsel.

In sum, Plaintiff's failure to provide evidence that it can fairly and adequately represent the proposed class leads the Court to conclude that Plaintiff has failed to satisfy Rule 23(a)'s adequacy requirement.

**B. Motion to Strike**

Defendant has asked this Court to strike the class allegations under Rule 12(f). However, neither Plaintiff nor Defendant directly addresses the requirements of Rule 12(f), which governs motions to strike pleadings. Instead, their arguments largely center on the merits of class certification. These two matters require separate inquiries, however, as the Court may not use a Motion to Strike to resolve disputed factual and legal issues. *See Whittlestone*, 618 F.3d at 973. Here, the analysis is limited to whether Defendant has established, as it must in a motion to strike pleadings, that Plaintiff's allegations are insufficient defenses, redundant, immaterial, impertinent, or scandalous. *Id.* at 973-74.

Ignoring the text of Rule 12(f), Defendant instead proposes three alternative theories for striking the class allegations that largely restate their arguments against class certification: (1) the Court should apply principles of comity based on its denial of class certification in *Dean*; (2) Plaintiffs' submission of new market efficiency evidence would not alter the Court's finding in *Dean* that class certification was improper because the class claims did not predominate; and (3), *Taylor v. Sturgell* precludes claims by absent class members who employ "tactical maneuvering" to bring suit on behalf of a party bound by a prior settlement. All of these arguments involve substantial legal or factual issues; therefore, they cannot be resolved by a Rule 12(f) Motion to Strike. *See Whittlestone*, 618 F.3d at 973 (registering concern that deciding issues under Rule 12(f) could insulate trial court's decision from appellate review).

Even if Rule 12(f) were the proper vehicle for addressing Defendant's comity argument, the argument is without merit. The cases Defendant cites suggest that a court may apply principles of comity to strike class allegations when an action is "materially identical" to a prior action and the reasons for denying class certification apply equally to the iterative case. *See, e.g., Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1279 (W.D. Wash. 2012). Even if this action is materially identical to *Dean*, it is not clear that the reason the Court denied class certification in *Dean* applies equally to this case. In *Dean* the Court held that Plaintiffs had failed to establish that questions of law or fact common to the class predominated over individual questions, as required under Rule 23(b)(3). That holding was based on a finding that one of the Plaintiffs' own experts had failed to demonstrate market efficiency. Plaintiffs in this action have submitted entirely new expert declarations. Given the different factual showings in each case, it would be improper to decide class certification issues based solely on comity. Having denied Plaintiff's Motion for Class Certification on Rule 23(a) grounds, the Court declines to decide whether Plaintiff satisfies the requirements of Rule 23(b). The Court notes, however, that if Rule 23(b) forms an additional barrier to class certification in this case, it is because the evidence Plaintiffs produced is insufficient to meet their burden under Rule 23(b), not because of principles of comity.

In the alternative, Defendant argues that the Court should strike the class allegations under Rule 23(d)(1)(D), on the basis of alleged collusion between Kim Group and the *Dean* plaintiffs. While there is

scant case law addressing when a Rule 23(d)(1)(D) motion is appropriate, what little authority exists suggests that a motion under this rule is premature until a court makes a final determination that class treatment is inappropriate. *See Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp.2d 1220, 1245-46 (C.D. Cal. 2011). For reasons addressed above, the Court declines to strike class allegations at this juncture and Defendant's Motion is removed from the calendar.

### C. Motions For Appointment As Lead Plaintiff

Victor van de Reijt Holding BV, a third party, and Plaintiff Kim Group move for appointment as Lead Plaintiff. Because no class has been certified, these motions are premature. Accordingly, they are denied without prejudice.

## V. CONCLUSION

For the foregoing reasons, the Court **DENIES** without prejudice Victor van de Reijt Holding BV's Motion for Appointment As Lead Plaintiff and Plaintiff Kim Group's Motion for Appointment As Lead Plaintiff. The Court **DENIES** Plaintiff's Motion for Class Certification and removes Defendant's Motion to Strike Class Allegations from the calendar.

**IT IS SO ORDERED.**

* * *

## APPENDIX H

**Denial of Petition for Permission to Appeal in *China Agritech, Inc. v. Dean***

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

| | |
|---|---|
| THEODORE E. DEAN, individually and on behalf of all others similarly situated; et al.,<br><br>Plaintiffs - Petitioners,<br><br>v.<br><br>CHINA AGRITECH, INC.; et al.,<br><br>Defendants - Respondents. | No. 12-80120<br><br>D.C. No. 2:11-cv-01331-RGK-PJW<br><br>Central District of California, Los Angeles<br><br>ORDER |

Before: SCHROEDER and TASHIMA, Circuit Judges.

Petitioners' request for judicial notice is granted.

The court, in its discretion, denies the petition for permission to appeal the district court's May 3, 2012, order denying class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam).

## APPENDIX I

**Class Action Notification Press Releases**

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**Glancy Binkow & Goldberg LLP**

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**Glancy Binkow & Goldberg LLP, Representing Shareholders of China Agritech, Inc., Announces an April 12, 2011 Deadline to Move for Appointment as Lead Plaintiff in the Shareholder Lawsuit – CAGC**

*March 14, 2011 21:40 ET* | **Source**: Glancy Binkow & Goldberg LLP

LOS ANGELES, March 14, 2011 (GLOBE NEWSWIRE) -- Glancy Binkow & Goldberg LLP announces that all persons or entities who purchased or otherwise acquired the securities of China Agritech, Inc. ("China Agritech" or the "Company") (Nasdaq:CAGC) between February 8, 2010 and February 3, 2011, inclusive (the "Class Period"), have 29 days until the April 12, 2011 deadline to move the Court to serve as Lead Plaintiff in the securities fraud class action lawsuit. The case filed by Glancy Binkow & Goldberg LLP, *Pepperdine v. China Agritech, Inc., et al.*, No. CV-11-01441-RGK, has been assigned to the Honorable R. Gary Klausner, United States District Judge for the Central District of California.

A copy of the Complaint is available from the court or from Glancy Binkow & Goldberg LLP. Please contact us by phone to discuss this action or to obtain a copy of the Complaint at (310) 201-9150 or Toll Free at (888) 773-9224, by email to share-

holders@glancylaw.com, or visit our website at http://www.glancylaw.com.

China Agritech, through its subsidiaries, manufactures and sells organic liquid compound fertilizers, organic granular compound fertilizers, and related agricultural products in the People's Republic of China. The Complaint alleges that defendants issued false and/or misleading statements and/or failed to disclose that, among other things: (1) certain of the Company's manufacturing facilities were idle or producing far less fertilizer than the Company portrayed; (2) the Company did not have the equipment to support its claimed production capacity; (3) the Company did not receive a license to manufacture granular compound fertilizer; (4) the Company had misrepresented its fertilizer production levels and sales; and (5), as a result, the Company's statements were materially false and misleading at all relevant times.

On February 3, 2011, analyst firm Citron Research published a report questioning China Agritech's financial statements and claimed production capacity. The report alleged that the Company has misrepresented the scope of its operations and that its financial statements filed with the Securities and Exchange Commission were materially different than the financial statements the Company's subsidiaries had filed with Chinese authorities.

As a result of this news, China Agritech shares declined $0.93 per share, or 8.63%, to close on February 3, 2011, at $9.85 per share, on unusually heavy volume.

The Private Securities Litigation Reform Act of 1995 ("PSLRA") requires the Court to appoint a "Lead Plaintiff" in this case. Any person or group who suffered a loss as a result of purchasing China Agritech securities between February 8, 2010 and February 3, 2011, may ask the Court to be appointed as Lead Plaintiff, but must file a motion no later than the April 12, 2011 deadline.

Glancy Binkow & Goldberg LLP is a law firm with significant experience in prosecuting class actions, substantial expertise in actions involving corporate fraud, and is representing China Agritech shareholders in this litigation.

If you wish to discuss this action or have any questions concerning this Notice or your rights or interests with respect to these matters, please contact Michael Goldberg, Esquire, of Glancy Binkow & Goldberg LLP, 1801 Avenue of the Stars, Suite 311, Los Angeles, California 90067, by telephone at (310) 201-9150, Toll Free at (888) 773-9224, by e-mail to shareholders@glancylaw.com, or visit our website at http://www.glancylaw.com.

Glancy Binkow & Goldberg LLP, Los Angeles, CA
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* * *

**Rosen Law Firm Representing China Agritech, Inc. Shareholders in Securities Fraud Class Action –CAGC**

NEW YORK, March 25, 2011 (GLOBE NEWSWIRE) -- The Rosen Law Firm, P.A. is representing China Agritech shareholders in a securities fraud class action. If you purchased the common stock of China Agritech, Inc. ("China Agritech" or the "Company") (Nasdaq:CAGC) during the period from February 8, 2010 through February 3, 2011 (the "Class Period"), you should contact the Rosen Law Firm for more information about the importance of serving as a lead plaintiff. The lawsuit seeks to recover damages for investors from violations of federal securities laws

To join the China Agritech class action, visit the Rosen Law Firm's website at http://www.rosenlegal.com , or call Laurence Rosen, Esq. or Phillip Kim, Esq., toll-free, at 866-767-3653; you may also email lrosen@rosenlegal.com or pkim@rosenlegal.com for information on the class action.

The Complaint alleges China Agritech issued materially false and misleading financial statements. Particularly, the Complaint alleges that on or about February 3, 2011, analyst firm LM Research issued a report (the "Report") alleging, among other things, that the Company's statement of revenue and earnings for the fiscal year 2009 are materially false and misleading. The Report, citing sources, claims that China Agritech's U.S. financial statements were materially different than the financial statements filed with Chinese authorities by a number of the Compa-

ny's subsidiaries. The report claims that the revenue reported in the Company's SEC filings for 2009 is ten times larger than what the Chinese regulatory reports show. The LM Research report also noted a number of potential badges of fraud within the Company. The Complaint alleges that when these disclosures of potential fraud concerning China Agritech were revealed to the market, the price of China Agritech stock dropped, damaging investors.

If you wish to join the class action as serve as lead plaintiff, you must move the Court no later than April 12, 2011. A lead plaintiff is a representative party acting on behalf of other class members in directing the litigation. For more information or to discuss your rights or interests regarding this class action, please contact Laurence Rosen, Esq. or Phillip Kim, Esq. of The Rosen Law Firm, toll-free, at 866-767-3653, or via e-mail at lrosen@rosenlegal.com or pkim@rosenlegal.com. You may also visit the firm's website at http://www.rosenlegal.com

No class has yet been certified in the above action. Until a class is certified, you are not represented by counsel unless you retain one. You may choose to do nothing at this point and remain an absent class member.

The Rosen Law Firm represents investors throughout the globe, concentrating its practice in securities class actions and shareholder derivative litigation.

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* * *

**The Rosen Law Firm Files Securities Class Action Charging China Agritech, Inc. with Securities Fraud — CAGC**

February 11, 2011 10:24 PM Eastern Standard Time

NEW YORK--(BUSINESS WIRE)--The Rosen Law Firm, P.A. today announced that it has filed a class action lawsuit on behalf of investors who purchased the common stock of China Agritech, Inc. ("China Agritech" or the "Company") (NASDAQ: CAGC) during the period from February 8, 2010 through February 3, 2011 (the "Class Period"). The lawsuit seeks to recover damages for investors from violations of the federal securities laws.

To join the China Agritech class action, visit the Rosen Law Firm's website at http://www.rosenlegal.com, or call Laurence Rosen, Esq. or Phillip Kim, Esq., toll-free, at 866-767¬3653; you may also email lrosen@rosenlegal.com or pkim@rosenlegal.com for information on the class action. The case is pending in the U.S. District Court for the Central District of California.

NO CLASS HAS YET BEEN CERTIFIED IN THE ABOVE ACTION. UNTIL A CLASS IS CERTIFIED, YOU ARE NOT REPRESENTED BY COUNSEL UNLESS YOU RETAIN ONE. YOU MAY CHOOSE TO DO NOTHING AT THIS POINT AND REMAIN AN ABSENT CLASS MEMBER.

The Complaint alleges China Agritech issued materially false and misleading financial statements. Particularly, the Complaint alleges that on or about February 3, 2011, analyst firm LM Research issued

a report (the "Report") alleging, among other things, that the Company's statement of revenue and earnings for the fiscal year 2009 are materially false and misleading. The Report, citing sources, claims that China Agritech's U.S. financial statements were materially different than the financial statements filed with Chinese authorities by a number of the Company's subsidiaries. The report claims that the revenue reported in the Company's SEC filings for 2009 is ten times larger than what the Chinese regulatory reports show. The LM Research report also noted a number of potential badges of fraud within the Company. The Complaint alleges that when these disclosures of potential fraud concerning China Agritech were revealed to the market, the price of China Agritech stock dropped, damaging investors.

If you wish to join the class action as serve as lead plaintiff, you must move the Court no later than April 12, 2011. A lead plaintiff is a representative party acting on behalf of other class members in directing the litigation. For more information or to discuss your rights or interests regarding this class action, please contact Laurence Rosen, Esq. or Phillip Kim, Esq. of The Rosen Law Firm, toll-free, at 866-767-3653, or via e-mail at lrosen@rosenlegal.com or pkim@rosenlegal.com. You may also visit the firm's website at http://www.rosenlegal.com.

The Rosen Law Firm represents investors throughout the globe, concentrating its practice in securities class actions and shareholder derivative litigation.

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**Rosen Law Firm – Representing China Agritech, Inc. Shareholders – Reminds Investors of Important April 12, 2011 Deadline in Class Action – CAGC**

*February 18, 2011 19:38 ET* | **Source**: The Rosen Law Firm PA PC

NEW YORK, Feb. 18, 2011 (GLOBE NEWSWIRE) -- The Rosen Law Firm, P.A. reminds investors of the important April 12, 2011 lead plaintiff deadline. If you purchased the common stock of China Agritech, Inc. ("China Agritech" or the "Company") (Nasdaq:CAGC) during the period from February 8, 2010 through February 3, 2011 (the "Class Period"), you should contact the Rosen Law Firm for more information about the importance of serving as a lead plaintiff. The lawsuit firm by the firm is seeking to recover damages for investors from violations of federal securities laws No class has yet been certified in the above action. Until a class is certified, you are not represented by counsel unless you retain one. You may choose to do nothing at this point and remain an absent class member.

To join the China Agritech class action, visit the Rosen Law Firm's website at http://www.rosenlegal.com, or call Laurence Rosen, Esq. or Phillip Kim, Esq., toll-free, at 866-767-3653; you may also email lrosen@rosenlegal.com or pkim@rosenlegal.com for information on the class action. The case is pending in the U.S. District Court for the Central District of California.

The Complaint alleges China Agritech issued materially false and misleading financial statements. Particularly, the Complaint alleges that on or about

February 3, 2011, analyst firm LM Research issued a report (the "Report") alleging, among other things, that the Company's statement of revenue and earnings for the fiscal year 2009 are materially false and misleading. The Report, citing sources, claims that China Agritech's U.S. financial statements were materially different than the financial statements filed with Chinese authorities by a number of the Company's subsidiaries. The report claims that the revenue reported in the Company's SEC filings for 2009 is ten times larger than what the Chinese regulatory reports show. The LM Research report also noted a number of potential badges of fraud within the Company. The Complaint alleges that when these disclosures of potential fraud concerning China Agritech were revealed to the market, the price of China Agritech stock dropped, damaging investors.

If you wish to join the class action as serve as lead plaintiff, you must move the Court no later than April 12, 2011. A lead plaintiff is a representative party acting on behalf of other class members in directing the litigation. For more information or to discuss your rights or interests regarding this class action, please contact Laurence Rosen, Esq. or Phillip Kim, Esq. of The Rosen Law Firm, toll-free, at 866-767-3653, or via e-mail at lrosen@rosenlegal.com or pkim@rosenlegal.com. You may also visit the firm's website at http://www.rosenlegal.com.

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* * *

## APPENDIX J

### Class Action Notification Press Releases

**Investor Notice: The Rosen Law Firm Updates China Agritech Shareholders on Securities Class Action –CAGC**

*June 29, 2012 19:05 ET* | **Source**: The Rosen Law Firm PA PC

NEW YORK, June 29, 2012 (GLOBE NEWSWIRE) -- The Rosen Law Firm, P.A. announces an update on the securities class action filed on behalf of purchasers of China Agritech common stock and call options (Nasdaq:CAGC). The Rosen Law Firm is lead counsel in the shareholder lawsuit *Dean v. China Agritech, Inc.*, 11-CV-1331 pending in federal court in Los Angeles (the "Action").

*First*, the Court upheld the complaint against the defendants' motions to dismiss in the Action. The Court held that the plaintiffs' complaint successfully alleged that China Agritech had committed securities fraud by overstating its revenues for 2008 and 2009 by 1,444% and 900%, respectively. The Court also held that the complaint successfully alleged that China Agritech had committed securities fraud by failing to disclose that its largest supplier was a related party, as it was 90% owned by China Agritech's CEO. Third, the Court held that the complaint adequately alleged China Agritech's motive to inflate revenue to benefit from his ownership of this related party.

*Second*, the Court denied the plaintiffs' motion for class certification. As a result, your rights as a

shareholder are no longer protected. You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech. Also because the Court denied the motion for class certification, the statute of limitations is running on any claims you have against China Agritech and its officers and directors.

If you purchased China Agritech stock or options and you wish to join the Action and protect your rights, or if you have any questions regarding your rights or interests with respect to China Agritech stock, please contact Jonathan Horne, Esquire, of The Rosen Law Firm, P.A., by telephone at (212) 686-1060 or Toll Free at (866) 767-3653 or by email at jhorne@rosenlegal.com. For more information about The Rosen Law Firm, P.A., please visit our website at www.rosenlegal.com

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**CORRECTING and REPLACING Rigrodsky & Long, P.A. Files Securities Fraud Class Action Lawsuit Against China Agritech, Inc.**

October 08, 2012 12:43 PM Eastern Daylight Time

CORRECTION...by Rigrodsky & Long, P.A.

WILMINGTON, Del.--(BUSINESS WIRE)--Seventh graph, first sentence of release should read: If you wish to serve as lead plaintiff, you must move the Court no later than December 7, 2012. (sted If you wish to serve as lead plaintiff, you must move the Court no later than December 4, 2012.)

> "E&Y [to] orally advise[] the Audit Committee that it may not be able to rely on management's representations based on the issues identified."

The corrected release reads:

**RIGRODSKY & LONG, P.A. FILES SECURITIES FRAUD CLASS ACTION LAWSUIT AGAINST CHINA AGRITECH, INC.**

Rigrodsky & Long, P.A. announces that it has filed a class action lawsuit in the United States District Court for the District of Delaware on behalf of all persons or entities that purchased the securities of China Agritech, Inc. ("China Agritech" or the "Company") (OTC Pink: CAGC) between November 12, 2009 and March 11, 2011 (the "Class Period"), alleging violations of the Securities Exchange Act of 1934 against certain of the Company's officers (the "Complaint"). The case is entitled *Smyth v. Chang*, Case No. 12-cv-1262 (D. Del.).

If you purchased shares of China Agritech during the Class Period, and wish to discuss this action or have any questions concerning this notice or your rights or interests, please contact Peter Allocco of Rigrodsky & Long, P.A., 825 East Gate Boulevard, Suite 300, Garden City, NY at (888) 969-4242, by e-mail to info@rigrodskylong.com, or at: http://www.rigrodskylong.com/news/china-agritech-inc-cagc.

The Complaint alleges that throughout the Class Period, defendants made materially false and misleading statements regarding the Company's business operations, financial condition and prospects. Specifically, the Complaint alleges that the Company overstated its revenues and omitted to disclose significant related-party transactions. On November 12, 2009, the Company filed a Form 10-Q with the U.S. Securities and Exchange Commission ("SEC") reporting its third quarter results. The 10-Q was false because it materially misstated the Company's revenue and net income for the quarter. The Company's Form 10-K, filed with the SEC on April 1, 2010, contained similar misstatements about the Company's revenue and net income, in addition to concealing related-party transactions involving China Agritech's Chief Executive Officer ("CEO"), Yu Chang ("Chang"). The 10-K indicated that the Company purchased 15% and 12% of its raw materials from Shenzhen Hongchou Technology Company Ltd. ("Shenzehn Hongchou") in fiscal 2009 and 2008, respectively. However, it failed to disclose that during that time, Defendant Chang owned 90% of Shenzhen Hongchou. Generally Accepted Accounting Principles, State of Financial Accounting Standards

and SEC regulations all require the Company to disclose all material related-party transactions, which it failed to do.

However, the truth started to reveal itself regarding the accuracy of China Agritech's financial statements. On February 3, 2011, the research firm LM Research published a report asserting that China Agritech was engaged in fraud. The report concluded that the Company's financial statements were fraudulent, its purported revenue was overstated and that its plants were idle. As a result of the LM Research report, shares in China Agritech declined from a close of $10.78 on February 2, 2011 to $9.85 on February 3, 2011, on unusually high volume of over 2.6 million shares. Then, on February 15, 2011, Bronte Capital issued a scathing report presenting additional facts indicating that China Agritech was engaged in fraud and could not possibly have produced the revenue it claimed in its financial statements. As a result of the Bronte Capital report, shares in China Agritech declined from a close of $9.21 on February 15, 2011 to $7.44 on February 16, 2011, again on unusually high volume of over 2.8 million shares.

On March 13, 2011, China Agritech announced the formation of a Special Committee of its Board of Directors to investigate the allegations of fraud that the Company maintained had been made by third parties. The next day, China Agritech announced in a Form 8-K filed with the SEC that Ernst & Young Hua Ming ("E&Y") had been dismissed as the Company's independent auditor. In explaining its reasons for the dismissal, the Company revealed that it had, in essence, concealed that E&Y had identified

serious problems with its financial statements as early as December 15, 2010 and had informed the Company's board that an internal investigation was necessary. Yet, the Company failed to correct the problems with the financial statements and failed to provide verification for certain transactions – prompting "E&Y [to] orally advise[] the Audit Committee that it may not be able to rely on management's representations based on the issues identified."

Additionally, on March 14, 2011, the NASDAQ halted trading in China Agritech stock with its share price at $6.88 per share and initiated delisting proceedings. On May 20, 2011, after being delisted by the NASDAQ, China Agritech shares opened for trading on the pink sheets. That day, shares in China Agritech closed at $3.80 per share, a decline of $3.08 per share, or almost 45%.

If you wish to serve as lead plaintiff, you must move the Court no later than December 7, 2012. A lead plaintiff is a representative party acting on behalf of other class members in directing the litigation. In order to be appointed lead plaintiff, the Court must determine that the class member's claim is typical of the claims of other class members, and that the class member will adequately represent the class.

Your ability to share in any recovery is not, however, affected by the decision whether or not to serve as a lead plaintiff. Any member of the proposed class may move the court to serve as lead plaintiff through counsel of their choice, or may choose to do nothing and remain an absent class member.

Rigrodsky & Long, P.A., with offices in Wilmington, Delaware and Garden City, New York, regularly litigates securities class, derivative and direct actions, shareholder rights litigation and corporate governance litigation, including claims for breach of fiduciary duty and proxy violations in the Delaware Court of Chancery and in state and federal courts throughout the United States.

Attorney advertising. Prior results do not guarantee a similar outcome.

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No. 17-432

IN THE
# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner*,

v.

MICHAEL H. RESH, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## SUPPLEMENTAL JOINT APPENDIX


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February 21, 2018

*(Additional Counsel Listed On Inside Cover)*


**PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 21, 2017**
**CERTIORARI GRANTED: DEC. 8, 2017**

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 2:11-CV-1331 RGK (PJWx)
(CLASS ACTION)

THEODORE E. DEAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
*Plaintiff,*

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants.*

No. 2:11-CV-1414 RGK (Ex)
(CLASS ACTION)

DEBORAH PEPPERDINE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
*Plaintiff,*

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants.*

No. 2:11-CV-2800 SVW (PJWx)
(CLASS ACTION)

EDUARDO CALCAGNO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
*Plaintiff,*

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants.*

[Filed May 16, 2011]

**~~PROPOSED~~ ORDER GRANTING THE MOTION OF THE CHINA AGRITECH SHAREHOLDER GROUP FOR: (1) CONSOLIDATION, (2) APPOINTMENT OF LEAD PLAINTIFF, AND (3) APPROVAL OF SELECTION OF COUNSEL [DENIED]**

Having considered the motion of Class Members Shi Yuan Jun, Giuliano and Adriana Biondi Lazzeretti, Yair Moskowitz, George Santos and Anne Marie Jones (collectively, the "China Agritech Shareholder Group" or "Movant") to: (1) consolidate the above-captioned related actions, (2) appoint Movant as Lead Plaintiff in the above-captioned action, and (3) appoint Saxena White P.A. and Glancy Binkow Goldberg LLP as Lead Counsel, and all papers and arguments submitted in support or opposition to the same, as well as all other documents on file with the Court, and good cause appearing therefor:

**I. CONSOLIDATION OF THE RELATED ACTIONS**

1. Pursuant to Fed. R. Civ. P. 42(a), the above-captioned actions are hereby consolidated and every pleading filed in the consolidated actions shall hereafter bear the following caption:

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| IN RE CHINA AGRITECH, INC. SECURITIES LITIGATION | ) Master File<br>) No. 2:11-CV-1331 |

## II. APPOINTMENT OF LEAD PLAINTIFF AND LEAD COUNSEL

2. Movant has moved this Court to be appointed as Lead Plaintiff in the action and to approve the counsel it retained to be Lead Counsel and Local Counsel.

3. Having considered the provisions of § 21D(a)(3)(B) of the PSLRA, 15 U.S.C. § 78u-4(a)(3)(B), the Court hereby determines that Movant is the most adequate plaintiff and satisfies the requirements of the PSLRA. The Court hereby appoints the China Agritech Shareholder Group as Lead Plaintiff to represent the interests of the class in the above-captioned action.

4. Pursuant to § 21D(a)(3)(B)(v) of the PSLRA, 15 U.S.C. § 78u-4(a)(3)(B)(v), Movant has selected and retained the law firms of Saxena White P.A. and Glancy Binkow Goldberg LLP to serve as Lead Counsel. The Court approves Movant's selection of Lead Counsel for the above-captioned action.

5. Lead Counsel shall have the following responsibilities and duties, to be carried out either personally or through counsel whom Lead Counsel shall designate:

a. to coordinate the briefing and argument of any and all motions;

b. to coordinate the conduct of any and all discovery proceedings;

c. to coordinate the examination of any and all witnesses in depositions;

d. to coordinate the selection of counsel to act as spokesperson at all pretrial conferences;

e. to call meetings of the plaintiffs' counsel as they deem necessary and appropriate from time to time;

f. to coordinate all settlement negotiations with counsel for defendants;

g. to coordinate and direct the pretrial discovery proceedings and the preparation for trial and the trial of this matter and to delegate work responsibilities to selected counsel as may be required;

h. to coordinate the preparation and filings of all pleadings; and

i. to supervise all other matters concerning the prosecution or resolution of the Consolidated Actions.

6. No motion, discovery request, or other pretrial proceedings shall be initiated or filed by any plaintiffs without the approval of Lead Counsel, so as to prevent duplicative pleadings or discovery by plaintiffs. No settlement negotiations shall be conducted without the approval of the Lead Counsel.

7. Service upon any plaintiff of all pleadings in this action, except those specifically addressed to a plaintiff other than Lead Plaintiffs, shall be complete upon service of Lead Counsel.[*]

8. Lead Counsel shall be the contact between plaintiffs' counsel and defendants' counsel, as well as the spokespersons for all plaintiffs' counsel, and shall direct and coordinate the activities of plaintiffs' counsel. Lead Counsel shall be the contact between the Court and plaintiffs and their counsel.

---

[* Paragraphs 5 through 7 of this document (page 3 of the original proposed order) were inadvertently omitted from the filed order denying the motion. *Compare* Dist. Ct. Dkt. 4-1 (proposed order including page 3) *with* Dist. Ct. Dkt. 21 (omitting page 3). Those paragraphs are included here to ensure completeness of the record.]

## III. NEWLY-FILED OR TRANSFERRED ORDERS

9. When a case that arises out of the subject matter of this action is hereinafter filed in this Court or transferred from another Court, the Clerk of this Court shall:

a. file a copy of this Order in the separate file for such action;

b. mail a copy of this Order to the attorneys for the plaintiff(s) in the newly filed or transferred case and to any new defendant(s) in the newly filed or transferred case; and

c. make the appropriate entry in the docket for this action.

10. Each new ease which arises out of the subject matter of the above-captioned action that is filed in this Court or transferred to this Court shall be consolidated with this action and this Order shall apply thereto, unless a party objecting to this Order or any provision of this Order shall, within ten (10) days after the date upon which a copy of this Order is served on counsel for such party, file an application for relief from this Order or any provision herein and this Court deems it appropriate to grant such application.

11. During the pendency of this litigation, or until further order of this Court, the parties shall take reasonable steps to preserve all documents within their possession, custody or control, including computer-generated and stored information and materials such as computerized data and electronic mail, containing information that is relevant to or which may lead to the discovery of information relevant to the subject matter of the pending litigation.

IT IS SO ORDERED.

DATED: MAY 16, 2011

[Handwritten:] Denied without prejudice to be determined at the time of certification

/s/ GARY KLAUSNER

THE HONORABLE R. GARY KLAUSNER
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. 2:11-CV-1331 RGK (PJWx)
(CLASS ACTION)

THEODORE E. DEAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
*Plaintiff*,

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants*.

No. 2:11-CV-1414 RGK (PJWx)
(CLASS ACTION)

DEBORAH PEPPERDINE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
*Plaintiff*,

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants*.

No. 2:11-CV-2800 SVW (JCx)
(CLASS ACTION)

EDUARDO CALCAGNO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
*Plaintiff*,

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants*.

[Filed May 16, 2011]

**~~PROPOSED~~ ORDER CONSOLIDATING RELATED ACTIONS, APPOINTING LEAD PLAINTIFF AND LEAD COUNSEL [DENIED]**

WHEREAS, the above-captioned securities class actions (the "Securities Class Actions") have been filed against defendants China Agritech, Inc., et al. (collectively "Defendants"), alleging claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder;

WHEREAS, Federal Rule of Civil Procedure 42(a) provides that a court may order all actions consolidated if they involve "common issues of law or fact." The Securities Class Actions involve common legal and factual issues; thus, efficiency and consistency will result from their consolidation;

WHEREAS, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(A)(i), on February 11, 2011, the plaintiff in the first-filed action caused notice to be issued to potential class members of the action and informed them of their right to move to serve as lead plaintiff within 60 days of the date of the issuance of said notice;

WHEREAS, on April 12, 2011 Slava Vanous, Clair Harpster, and Randolph Daniels-Kolin ("Movant" or the "Vanous Group") timely moved the Court to consolidate the Securities Class Actions, for appointment as lead plaintiff and to approve their selection of the Rosen Law Firm, P.A. as lead counsel;

WHEREAS, the PSLRA, provides, *inter alia*, that the most-adequate plaintiff to serve as lead plaintiff is the person or group of persons that has either filed a complaint or has made a motion in response to a

notice, and has the largest financial interest in the relief sought by the Class and satisfied the pertinent requirements of Fed. R. Civ. P. 23;

WHEREAS, the Court finding that the Vanous Group has the largest financial interest in this action and *prima facie* satisfies the typicality and adequacy requirements of Fed. R. Civ. P. 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); and

**IT IS HEREBY ORDERED THAT:**

**CONSOLIDATION OF SECURITIES CLASS ACTIONS**

1. The Securities Class Actions are consolidated for all purposes including, but not limited to, discovery, pretrial proceedings and trial pursuant to Fed. R. Civ. P. 42(a).

**MASTER DOCKET AND CAPTION**

2. The docket in case number No. 2:11-CV-1331 RGK (PJWx) shall constitute the Master Docket for this action.

3. Every pleading filed in this consolidated action shall bear the following caption:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Master File No. 2:11-CV-1331 RGK (PJWx)

| | |
|---|---|
| In re China Agritech, Inc. Securities Litigation | CLASS ACTION<br>JUDGE:<br>R. Gary Klausner |
| This Document Relates To: | |

4. The file in Civil Action No. 2:11-CV-1331 RGK (PJWx) shall constitute a master file for every action in the consolidated action. When the document being filed pertains to all actions, the phrase "All Actions" shall appear immediately after the phrase "This Document Relates To: ". When a pleading applies to some, but not all, of the actions, the document shall list, immediately after the phrase "This Document Relates To: ", the docket number for each individual action to which the document applies, along with the last name of the first-listed plaintiff in said action.

5. All Securities Class Actions subsequently filed in, or transferred to, this District shall be consolidated into this action. This Order shall apply to every such action, absent an order of the Court. If a party wishes to object to such consolidation, or to any other provisions of this Order, that party must file an application for relief from this Order within ten days after the date on which a copy of this Order is mailed to that party's counsel.

6. This Order is entered without prejudice to the rights of any party to apply for severance of any claim or action, with good cause shown.

**APPOINTMENT OF LEAD PLAINTIFF AND LEAD COUNSEL**

7. Pursuant to Section 21D(a)(3)(B) of the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(B), the Vanous Group is appointed Lead Plaintiff of the class, as the Vanous Group has the largest financial interest in this litigation and otherwise satisfies the requirements of Fed. R. Civ. P. 23.

7. Movant's choice of counsel is approved, and accordingly, the Rosen Law Firm, P.A. is appointed Lead Counsel.

8. Lead Counsel, after being appointed by the Court, shall manage the prosecution of this litigation. Lead Counsel are to avoid duplicative or unproductive activities and are hereby vested by the Court with the responsibilities that include, without limitation, the following: (1) to prepare all pleadings; (2) to direct and coordinate the briefing and arguing of motions in accordance with the schedules set by the orders and rules of this Court; (3) to initiate and direct discovery; (4) prepare the case for trial; and (5) to engage in settlement negotiations on behalf of Lead Plaintiff and the Class.

SO ORDERED:

DATED: MAY 16, 2011

[Handwritten:] Denied without prejudice to be determined at the time of certification

/s/ GARY KLAUSNER

---

Hon. R. Gary Klausner
U.S. District Judge

[Attorney Names & Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. 2:14-CV-05083-RGK-PJW

MICHAEL H. RESH, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
*Plaintiff,*

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants.*

[Filed June 30, 2014]

**PLAINTIFF'S NOTICE OF RELATED CASES AND NOTICE OF PENDENCY OF OTHER ACTIONS OR PROCEEDINGS [Civ.L.R. 83-1.3 & Civ.L.R. 83-1.4.2]**

**TO THE COURT AND ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

Pursuant to Civil Local Rule 83-1.3, Plaintiff Michael H. Resh ("Plaintiff") hereby gives notice of the following related actions formerly pending in the United States District Court for the Central District of California, Western Division, and one formerly pending after it had been transferred from the District Court of Delaware; and pursuant to Civil Local Rule 83-1.4.2, Plaintiff gives further notice of the pendency of another action presently being litigated in the Delaware Court of Chancery, as follows.

I. NOTICE OF RELATED CASES [Civ.L.R. 83-1.3]

Both actions identified below, previously pending in this district, sought to represent a class of China Agritech, Inc. ("CAGC") common stockholders of [sic] regarding violations of the federal securities laws against defendants, China Agritech, Inc. ("CAGC"), Yu Chang, Yau-Sing Tang, Gene Michael Bennett, Xiao Rong Teng, Ming Fang Zhu, Lun Zhang Dai, Hai Lin Zhang, Charles Law, and Zheng Anne Wang (collectively, the "Defendants"):

| Case Name | Case No. | Filing Date |
|---|---|---|
| *Dean v. China Agritech, et al.* ("*Dean*"); | CV 11-01331 RGK (PJWx) | 02/02/2011 |
| *Smyth v. Yu Chang, et al.* ("*Smyth*"). | CV 13-03008 RGK (PJWx) | 04/19/2012 |

The *Dean* Action originated here before the Honorable R. Gary Klausner until it was voluntarily dismissed by agreement of the parties. *See Dean* Action, Order Dismissing Case, Dkt. 205 (Sept. 20, 2012). Shortly thereafter, different plaintiffs commenced the *Smyth* Action in the District Court of Delaware (*See Smyth* Action, Dkt. 1) (Oct. 4, 2012). Defendant CAGC moved to transfer the action back to the Central District (Dkt. 18, Feb. 19, 2013), which the Delaware court granted on April 19, 2013, and entered an order confirming the transfer (Dkt. 42, Apr. 30, 2013). However, the *Smyth* Action, like the *Dean* Action, was voluntarily dismissed by mutual agreement of the parties. *See Smyth* Action, Order Grant'g Dismissal, Dkt. 136, Jan. 9, 2014.

### A. Brief Factual Statement

As with this instant action, the plaintiffs in *Smyth* and *Dean* also alleged that the Defendants engaged in securities fraud in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, and sought the following on behalf of a proposed class of purchasers of the common stock of CAGC between November 12, 2009 and March 11, 2011 (the "Class"): (1) Determination that the action is a proper class action; (2) Awarding compensatory damages in favor of Plaintiff and the proposed Class against all Defendants for all damages to be sustained as a result of Defendants' wrongdoing; (3) Awarding Plaintiff and the proposed Class their reasonable attorneys' fees, costs and expenses; and (4) Any other relief the Court may deem just and proper.

### B. Plaintiff's Action Should be Deemed Related and Assigned to Judge Klausner's Calendar [Civ.L.R. 83-1.4]

Plaintiff intends to successfully prosecute the claims asserted against the Defendants and protect the interests of the proposed Class who likewise sustained significant losses once CAGC's fraudulent actions were revealed to the market. For the foregoing reasons, Plaintiff believes that his action should be deemed related to the *Dean* and *Smyth* actions and assigned to Judge Klausner's calendar for all purposes.

## II. NOTICE OF PENDENCY OF OTHER ACTIONS OR PROCEEDINGS [Civ.L.R. 83-1.4]

### A. Parties and Counsel

#### 1. Delaware Derivative Action

*In re ChinaAgritech, Inc, S'holder Deriv. Litig.*, Case No. C.A. 7163-VCL, filed January 10, 2012, in

the Delaware Chancery Court ("Delaware Derivative Action").

| | |
|---|---|
| Lead Derivative Plaintiff: | Albert Rish |
| Derivative Action Defs: | Yu Chang, Yau-Sing Tang, Xiao Rong Teng, Gene Michael Bennett, Ming Fang Zhu, Zheng Anne Wang, Charles Law, Lun Zhang Dai, Xuenong Zhang, Kai Wai Sim, Hai Lin Zhang, and Nominal Defendant China Agritech Inc. |

The names, addresses, and phone numbers of the attorneys in the Delaware Derivative Action are:

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**2. California Superior Court Action**

*Gearing v. China Agritech, Inc.*, Case No. SC117290, filed June 5, 2012, in the Los Angeles County Superior Court (the "California State Court Action").

Plaintiffs: Thomas J. Gearing, the T.J.G. Private Annuity Trust, and Rosemary Gearing.

Defendants: China Agritech, Inc., Kabani and Company, Crowe Horwatch, CAI Investment Inc., Yu Chang, Yau-Sing Tang, Xiao Rong Teng, Gene Michael Bennett, Ming Fang Zhu, Zheng Anne Wang, Charles Law, Lun Zhang Dai,

Xuenong Zhang, Kai Wai Sim, Hai Lin Zhang, and Rodman & Renshaw LLC.

The names, addresses, and phone numbers of the attorneys in the California State Court Action are:

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**B. Brief Factual Statements**

**1. Delaware Derivative Action**

As with this instant action, the Delaware Derivative Action broadly contends that defendant China Agritech is a fraud, by virtue of, *inter alia*, Defendants' failure to use the proceeds from their public offering for the stated purpose and repeated failures to maintain effective internal controls that prevented the company from making public filings with the SEC and caused the stock's ultimate delisting such that defendants have breached their fiduciary duties, and seeks damages sustained as a result of such breaches of fiduciary duties. Therefore, under L.R. 83-1.4.2(e), this action involves all or a material part of the subject matter of the Derivative Action.

**2. California State Court Action**

Similarly, as with the instant action, the California Superior Court Action brought California state law claims for fraud, negligence, negligent misrepresentation and unjust enrichment based on allegations that plaintiffs purchased shares of China Agritech at an inflated price due to fraudulent records having been filed with the SEC due to Defendants' fraudulent conduct and enrichment at the expense of other investors. Therefore, under Civ.L.R. 83-1.4.2(e), this action involves all or a material part of the subject matter of the California Superior Court Action. Defendants attempted to remove the action to the Central District, but Judge Klausner remanded the action back to state court on July 16, 2012 (*See Gearing v. China Agritech, Inc.*, Case No. CV 12-5039-RGK (PJWx) (Dkt. 23)), and the case was eventually dismissed in its entirety on May 23, 2013. *See* Cal. Super. Ct. Action, Req. for Dismissal.

## III. CONCLUSION

**WHEREFORE**, Plaintiff respectfully requests:

1. That upon filing of the Plaintiff's Complaint, the action be assigned to the calendar of the Honorable R. Gary Klausner, the Judge assigned to the low-numbered action, CV 13-03008 RGK (PJWx); and

2. That all subsequent related actions be related to the instant action and assigned to the Honorable R. Gary Klausner.

Dated: June 30, 2014

**WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP**

By: */s/ Betsy C. Manifold*
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*Attorneys for Plaintiff and the [Proposed] Class*

**Aronson Declaration Exhibit 4**

## LM Research

February 2011

### China Agritech: A Scam

Based on our research, China Agritech, Inc. (listed on NASDAQ as CAGC) is not a currently functioning business that is manufacturing products. Instead it is, in our view, simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management. Our price target of $2 is based on the cash currently reported on CAGC's books—$45.8 million—divided by the number of shares outstanding. The company's remaining business does not, we believe, exceed $7.5 million in revenue per year. If the overhead associated with maintaining a listed company is taken into account, there is no profit. Since we believe China Agritech has no valuable technology, intellectual property, customer relationships, or capital assets, there is no value to the company other than dissolution value.

**Disclosure: Writers and contributors to this report have short positions in CAGC (and / or own options on the stock), and therefore stand to realize significant gains in the event that the price of the stock declines. Following publication of any report, we intend to continue transacting in the securities covered therein, and we may be long, short, or neutral at any time hereafter regardless of our initial recommendation. This is not an offer to sell**

**or a solicitation of an offer to buy any security, nor shall any security be offered or sold to any person, in any jurisdiction in which such offer would be unlawful under the securities laws of such jurisdiction. We have obtained all information contained herein and in reports from sources we believe to be accurate and reliable. However, such information is presented "as is," without warranty of any kind – whether express or implied.**

*Company*: China Agritech Inc. (NASDAQ: CAGC)

*Current Stock Price*: $11.00

*Target Price*: $2.00

*Current Market Capitalization*: $230 million

*Basic Argument*: The Company's actual revenues are under $7.5 million and dwindling.

## Summary

- China Agritech ("CAGC", "Agritech" or the "Company") is a $230 million company that purportedly manufactured and sold $119 million worth of "green" fertilizers throughout China in 2010. In reality, we believe Agritech's factories are currently all idle and only one out of its four factories produced anything at all in 2010.
- Despite having raised over $70 million in capital since 2005, Agritech appears to have acquired only several million dollars worth of capital equipment. By contrast, it has paid its two founders at least $4 million in rental fees and real estate purchases during that time.

- We have been unable to obtain even one sample of Agritech product, even from headquarters, nor have we found a single distributor or sales outlet.
- Companies Agritech claims as clients, such as the big state-owned fertilizer company Sinochem, deny having any contracts with Agritech. Sinochem has told us that it does not sell any Agritech products.
- Government officials in China told us that Agritech does not have a license to manufacture granular fertilizers, which the company claims are its largest product line.
- We visited each Agritech facility and found each one empty, idle, and without production equipment.
- Agritech's CFO has been involved in two listed companies before Agritech in which he personally collected seven-figure sums while the companies went to zero. Analysts have called these earlier companies "pump and dump" schemes.
- In early 2010, the U.S. Financial Industry Regulatory Authority (FINRA) lodged a formal inquiry with CAGC questioning insider share transactions.
- Our calls and emails to the company requesting clarification have gone unanswered.
- All evidence suggests that this company has never been a successful vendor of fertilizer and is currently fraudulent.

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**China Agritech: A Company that barely exists**

On January 21st, China Agritech Inc. (listed on the NASDAQ under the ticker CAGC) reported 2010 annual revenues of $119 million: up 56% from 2009 and well ahead of the $107 million average estimate. The share price rose 5%. As far as we can determine, however, this revenue number was invented out of thin air.

***Factories are idle:*** After visiting Agritech's reported manufacturing facilities in Beijing, Anhui, Xinjiang, and Harbin, we found virtually no manufacturing underway. The single exception was the facility in Pinggu County on the outskirts of Beijing, where the plant was not in operation on the Friday when we visited but local people told us that it has sporadically produced some liquid fertilizer over the last year. Plants in Bengbu, Anhui (supposedly the largest), Harbin, and Xinjiang were completely shuttered.

***Harbin plant for sale:*** The Harbin facility – supposedly a major manufacturing facility for the $100 million revenue business – whose name has never been officially changed in government documentation from "Pacific Dragon," had a sign hanging on the gates last summer reading "this factory is for sale." Although the company gives an adjacent address for its facility, which has a signboard reading "Harbin Agritech," the registration documents with the local Administration of Industry and Commerce (AIC) have not been updated (a serious regulatory violation in China).

"For Sale" sign on CAGC's factory in Heilongjiang. Photo taken in Fall 2010.

***No contract with Sinochem:*** A January Agritech announcement states: "In May 2010, the Company signed a renewed contract supplying organic liquid compound fertilizers to Sinochem, China's largest fertilizer distributor. The sales contract is worth RMB 61 million (approximately $9 million) and the Company will also continue to supply Sinochem with organic granular compound fertilizer under another existing contract." But a manager with Sinochem told us that Sinochem has no contract with Agritech and in fact has never bought or sold organic liquid fertilizers.

***No distribution centers:*** A $19 million raise managed by Rodman & Renshaw in 2010 was billed as funding for a proprietary distribution network, and last month, Agritech announced that it was ahead of schedule in setting up regional distribution centers. The company said it had established 21 such centers

in Henan and Jiangsu provinces. In reality, we could find none, whether online, through directory information, through calling the company itself, or asking other fertilizer companies. Here are the words of a manager of one of China's largest fertilizer distribution companies, which previously distributed product in Henan for China Green Agriculture (CGA):

"I have never heard of anybody besides ourselves in Henan Province who distributes liquid humic acid fertilizer. The sales volume for liquid humic acid-based fertilizers is insufficient, so China Green Agriculture's factory stopped selling in Henan this year. I don't know of another such distribution center in Henan, for another company; if there was one, I would be the first one to know."

***Agritech not permitted to make granular fertilizer:*** Agritech claims that most of its sales volume now derives from granular compound fertilizers. But government officials familiar with the Agritech operation say that Agritech has not received a license to manufacture granular compound fertilizer and does not sell any.

***Unable to buy the product:*** Although the company has announced 21 regional distribution centers, we have not been able to locate any. We attempted at some length to purchase at least one bottle of the Agritech product but were disappointed. Fertilizer distributors listed on a popular industry website did not carry Agritech product. We looked for the addresses of retail locations. Then we tried buying online via the popular site Taobao or an agricultural products site, with no luck. Then, we telephoned the company. We asked for retail locations, but the staff member who answered the phone said that they could only fill our order directly. We explained that

we wanted one bottle as a sample before making a bigger order. She said that the company is able to fulfill only wholesale orders. When we persisted, the staff member said that a distributor would be passing through our area, Beijing, the following week and would drop off a sample, but that did not happen. When we called the number for the "distributor" the following week, the phone was unanswered.

***Fictional revenue:*** Through legal agents, we have received an analysis of audited CAGC revenues reported to the Chinese government for the year 2009 in every subsidiary we were able to trace—including the Beijing subsidiary, which is mysteriously unreported by the company. We were able to review CAGC's results from its companies in Anhui, Beijing, Heilongjiang, and Xinjiang. The branch company in Chongqing, we were told by government sources, does not keep a separate P&L but instead records its revenue through its parent company. We did not find a record of a Xinjiang branch company.

Gross revenue, profit and fixed assets reported to the government in these companies for 2009 was as follows:

| Subsidiary Name | 2009 Gross Revenue (RMB) | Profit (Loss) (RMB) | Fixed Asset Value (RMB) |
|---|---|---|---|
| Harbin Pacific Dragon Liquid Compound Fertilizer Co. Ltd. | 580,000 | (7,000) | 1 million |
| Agritech Fertilizer Company (Beijing) | 46.65 million | 7.61 million | 10.95 million |
| Anhui Agritech Agricultural Development Co. Ltd. | 530,000 | (94,000) | 2.73 million |

| | | | |
|---|---|---|---|
| Xinjiang Agritech Agricultural Resources Co. Ltd. | 3.82 million | (250,000) | 20,000 |
| **Totals Reported to SAIC (in RMB)** | **51.58 million** | **7.259 million** | **14.7 million** |
| **Totals Reported to SAIC (in USD)** | **$7.58 million** | **$1.067 million** | **$2.16 million** |
| **Numbers reported to the SEC** | **$76.13 million** | **$5.69 million** | **$5.98 million** |
| **SEC figures as a multiple of SAIC** | **10x higher** | **5x higher** | **3x higher** |

In its Q3 2010 report, Agritech claims that it has 100,000 metric tons of production capacity in Anhui, 50,000 metric tons in Harbin, and 50,000 tons in Xinjiang. But a total value of US$3,000 in plant and equipment in Xinjiang would be insufficient to support 50,000 tons of production capacity. Indeed, when we visited the site of the Xinjiang plant, we found little more than a warehouse, shared with two other companies and demonstrating no activity.

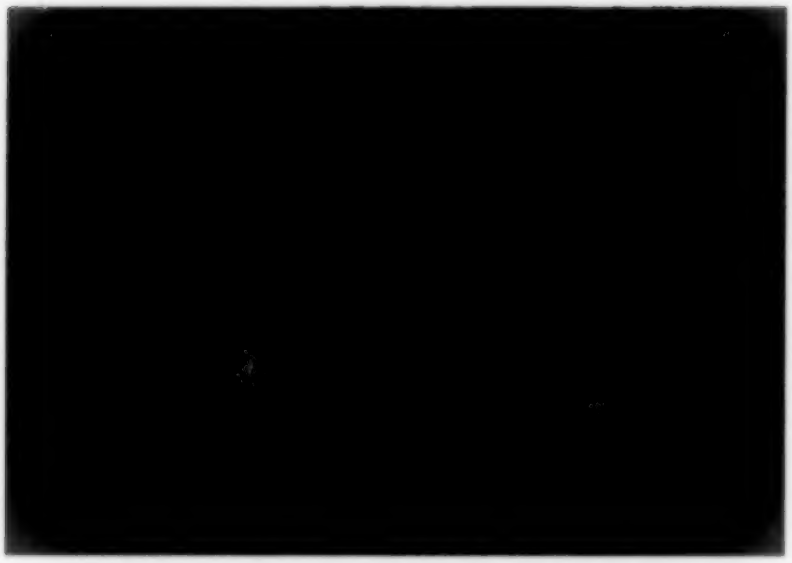
Our early attempts to find the Xinjiang factory were unsuccessful; there is no Agritech building at the company's legally registered address, and neither local government officials nor other companies in the high-tech park on the outskirts of Urumqi that is officially the site of the plant had ever heard of China Agritech. Finally, after searching the area and asking county officials, we were able to discover a facility bearing Agritech's name along with the names of two other companies, including the instruments company from which Agritech reportedly rents its facility. The facility, however, is idle, and we were told by local people that there is no production activity there.

The facility outside of Urumqi, which is idle, has Agritech's name but also the names of two other factories.

In Anhui, which Agritech calls its principal production facility, $400,000 worth of plant and equipment would seem slim for 100,000 tons of production capacity. We visited and found a small plant on a rutted road outside Bengbu, completely deserted.

The Agritech factory in Bengbu, Anhui,
January 2011

The Beijing plant is larger, but plant staff said in our presence that the facility was idle. The company would not allow us in, but we drove around the plant and saw a few people on site washing clothes but no evidence of production. Local government officials said that Agritech had not been able to obtain a production license for granular fertilizer and that it produced a very small volume of liquid fertilizer.



Agritech factory in Pinggu County, Beijing,
January 2011

We can only conclude that China Agritech has no product. Insiders are taking wealth from their shareholdings, since clearly they cannot derive wealth from company profits: in January alone, co-founder Teng Xiaorong took in about $260,000 from share sale proceeds, and in 2010 she sold over $1 million worth of stock in the company in addition to being issued new shares. Ms. Teng, who according to the company's 2010 annual proxy received $131,524 in direct cash compensation last year from CAGC, is a director of the company without an executive role.

In other words, as Agritech's actual revenue and profitability have dwindled to nothing, insiders have levered more money out of the company in shares sales. Added to that, insiders have reaped benefits from the sale and rental of real estate to Agritech.

***No distribution centers:*** In May 2010, Agritech issued over 1.4 million new shares, raising just under $19 million for the construction of distribution centers. But we have not been able to find evidence that any distribution centers were actually built.

***Mysterious suppliers:*** The companies that Agritech lists in its corporate materials as suppliers of raw materials, including Harbin Haiheng Chemical Distribution Co., Beijing Zhongxin Chemical Development Co., and Shenzhen Hongchou Technology Co., cannot be found in any directory under possible Chinese names that would correspond to the transliterated names or under the alphabetic names. No companies with names resembling these appear on industry lists of companies making humic acid or ingredients for "green" fertilizers. In fact, we speculate that the companies, if they ever existed, form an outdated supplier list, since at least three of Agritech's four factories are closed down.

For example, Agritech lists a supplier they call "Beijing Zhongxin Chemical Development Company." No such company exists, although there is one in Beijing called "Beijing Zhongxin Trading Company" listed on the Internet.[i] However, when we called the Beijing operator for directory assistance, she could find no such company listed in the active directory. We gave her the phone number listed on the Internet site (010-66067374) and asked her to do a "reverse look-up" of the number. She advised us that this is a number for a public phone booth, not a legitimate business phone number. All other searches for the suppliers mentioned in the 10K filing were futile.

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[i] http://www.701sou.com/index.php?lang=en&act=approximatch%20search&cat=1101&where=BEIJING&what=Wholesales&dAction=Search&refinement[ennbhd][1]=XiCheng+District&item=1&sort=distance

Agritech gives no information about customers or distributors in the two most recent 10Ks; we had to go back three years to find the names of any such companies. We decided to contact each of the companies mentioned in that three-year-old 10K. We could verify only one of the names – Sinochem, which had already told us they do not do business with Agritech. We were not able to find active businesses with active phone numbers for any of the other supposed customers listed by Agritech.

**Financial anomalies**

We have done some analysis of financial reports that Agritech has provided to its SAIC regulators in China and have determined the following:

1. The Harbin company, Pacific Dragon, has cumulative losses since 1994 of over 4 million RMB. None of its 2009 revenue was actually received but all was entered into "accounts receivable." Meanwhile, the debt-to-asset ratio is 98% and quick ratio is 61%. There were no sales expenses at all, only administrative expenses. In short, the 2009 audit report on CAGC's Harbin company shows a dead company.

2. The Anhui facility has generated losses every year since its establishment in 2006. By the end of 2009, it had lost 3.89 million RMB. The company had zero cash on its books.

3. The Xinjiang company reports zero fixed assets, meaning that it owns no equipment for production. Moreover, its 75% parent is the Anhui company, yet the Anhui company never reported making the required investment in the Xinjiang subsidiary.

4. The Beijing facility has licensed registered capital of $20 million, but by the end of 2009 had received 88 million RMB, so only more than half of the legally required amount. But despite the missing capital, half of the registered capital was still sitting in the account in cash in 2009, indicating that the company had not purchased much, if any, equipment.

**Checkered history of humic acid**

China's fertilizer market is very large: China consumes about 30% of the world's total fertilizer. But the vast majority of these fertilizers are nitrogen, phosphate, and potash chemical fertilizers. A large volume of natural fertilizers, derived from manure or various types of plant mulch, are still used by individual farmers but not commercialized. The market for specialty fertilizers like humic acid is small, fragmented, and suspicious of the commercial players that have come sprinting into the market since about 2006. Interviews with multinational fertilizer companies have confirmed to us that they do not see any market in China for humic acid, "fulvic acid," or other commercial organic fertilizers.

The national interest in humic acid—the key component of organic fertilizers made by CAGC, China Green Agriculture (CGA) and others—was prompted by Long Marcher Wang Zhen in the late 1970s. As a key influencer of the coal industry, agricultural policy, and the territory of Xinjiang (whose capture was largely attributed to his military skill), Wang Zhen formulated the idea that humic acid could be a high value-added product of coal for use in medicine and farming, and he directed funds to research and development of humic acid. That funding lasted for nearly two decades, until, in 1987, human trials of

humic acid for medicinal use reportedly led to disastrous results.[11] The government withdrew licensing authority from four provinces up to the national level.

A number of institutes under the former Ministry of Coal continued researching the use of humic acid in agriculture, but as the price of coal rose, starting around 2000, few institutes wanted to focus on coal byproducts. Individual researchers instead broke out of the government companies and labs to start up companies that would commercialize humic acid. Around 2004, technological improvements made it possible to extract more of the active ingredient, fulvic acid, and make it water-soluble. By the end of 2004, there were roughly 3,000 companies in China making humic acid or its derivative fertilizers. Sales were driven by speculative capital, and the market appears to have peaked in 2008.

Because no quality or active-ingredient standards have been applied to natural fertilizers like humic acid, the quality of product on the market has been extremely uneven, and acceptance by farmers has been cautious. By the accounts of many companies that distribute fertilizer, in 2009, the market dwindled, and now farmers show little interest in the humic acid fertilizers that had been billed as a wonder drug for crops.

To make matters worse, in 2009-2010, government environmental regulation gradually closed down some of the manufacturers and put a ban on expansion for the others. The production process uses

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[11] Qin Wande: "The Humic Acid Industry: Retrospective and Outlook," Coal Industry Ministry Publication 100713, 2004, courtesy of Wanfang Data.

around 10 tons of dusty, weathered coal each day that has to be crushed then liquefied in order to make 2,000 tons per year of humic acid. The manufacturing process, to some extent borrowed from Japanese 1960s technology, is outdated and dirty and makes an easy target for local governments that are trying to meet new environmental standards. China's largest manufacturer of humic acid, in Inner Mongolia, closed in 2010. High-quality humic acid has become difficult to obtain, with major manufacturers in Xinjiang and Shaanxi saying that they are refusing domestic orders since they intend to go into manufacturing end product instead. There is a 60-day wait for order fulfillment for the best overseas customers.[iii]

***Low-revenue, low-profit business***

We visited one of China's largest manufacturers of pure humic acid, a factory that produces 2,000 tons of humic acid per year. Based on the current requirement that humic acid fertilizers contain 4% of the active ingredient, and that the blended humic acid fertilizer can be combined with 30% inactive ingredients, the 2,000 tons of humic acid can yield about 75,000 tons of fertilizers. Currently earning 10,300 RMB per ton of humic acid—a price that has doubled in 12 months—this company estimates 20 million RMB in gross revenues for the current year, or about $3 million. The managers believe that, if they can use all their production for their own end product, they may be able to triple revenues. Even these optimistic estimates, however, would not bring the

[iii] Based on interviews in January with the Chinese Humic Acid Association, the State Environmental Protection Ministry in Beijing, and companies in humic acid production.

company anywhere close to the revenues claimed by Agritech.

Not permitted to expand production and concerned that its existing outdated equipment may have to be replaced, this company is now driving into the manufacture of blended fertilizers under its own brand, in order to extract more value from the existing facility.

***Money-losing compounds***

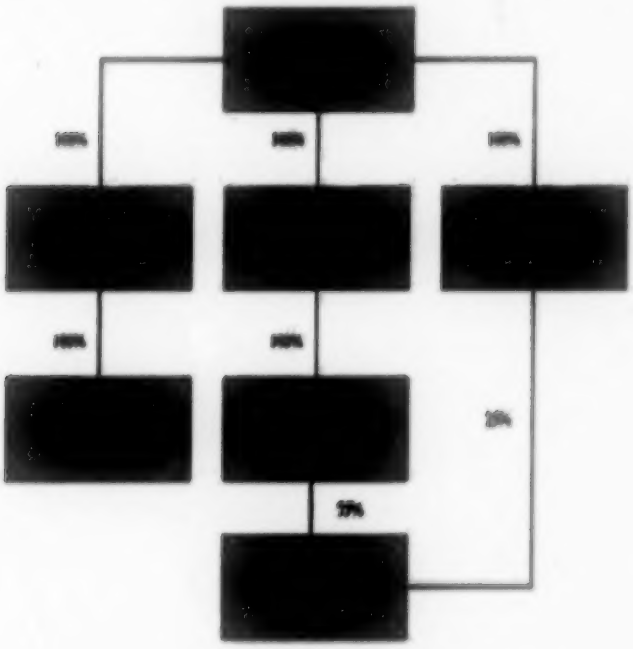
As market prospects for humic acid have dwindled, China Agritech, China Green Agriculture, and other producers of natural fertilizers have been driven into compounds, where the admixture of chemical fertilizers adds volume and market acceptance.

The problem is that compounds earn slim or negative margins. In 2008, the compound fertilizer production volume showed negative growth, as raw materials prices soared and farmers limited consumption to manage their costs. According to the China National Chemical Industry Information Center (CNCIC), China's production volume for compound fertilizers in 2008 was 200 million tons per year, while actual production was only 50 million tons. Product prices are essentially determined by the input costs plus 1-3%. That means manufacturers of compounds, if they produce at all, are doing so at razor-thin margins. Given that Agritech claims to produce 200,000 tons of granular compounds against 13,000 tons of higher-margin liquid compound fertilizers, a 28.5% EBITDA margin in 2009 should be viewed as a feat of magic by large competitors like Sinofert (HKG: 297). In 2009, Sinofert sold about 1.01 million tons of granular compounds. The company's EBITDA margin in 2009 was negative. Although only 20% of Sinofert's revenues is derived from its own manu-

facturing rather than agency sale of compounds, margins are similar on that side of the business.

Faced with industrial fragmentation and losses, China's government agencies in 2008-2009 issued policies designed to consolidate the industry, shutter high-cost manufacturers, and convey expansion capital and other benefits to large producers. Lower prices of nitrogen in 2009 bolstered production of compounds to about 55,000 tons, often at a small profit. But small producers and newcomers like Agritech were not able to obtain production licenses for compounds. Local government officials told us that Agritech had not obtained licenses for manufacturing compounds in any of its facilities and was restricted to making liquid compounds at the facility in Beijing. A government official in charge of regulating a part of Agritech's business and who was very familiar with the company estimated that, nationwide in 2010, Agritech did not have more than 50 million RMB in revenues.

**Organizational Structure as of 12/31/09**[iv]



***Corporate Structure as of September 2010***

By the end of November 2010, Agritech's 424B3 report filed with the SEC stated that the company had established several new subsidiaries: Diamond King Group (BVI), China Agritech Investments (Hong Kong), and Yinong Agricultural Co. Ltd. (PRC), as well as a new branch company in Xinjiang. Our checks against government records, however, found no companies involved in fertilizer with Chinese characters sounding like "Yi Nong" in the name whose parent company is named Agritech. The company of course could exist. But we have found a

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[iv] Note: Tailong is sometimes called "Pacific Dragon," the English translation of the name.

frustrating pattern with Agritech of announcing only English-language company names and choosing names that could represent dozens of different Chinese characters.

The November prospectus also indicates that China Tailong Holdings has established a new representative office in Beijing. Given that the headquarters building in Beijing was deserted other than by about five people when we visited, we are puzzled as to why the company would need an additional representative office. Representative offices are highly restricted as to the scope of their activities and pay onerous taxes if they are deemed to be engaging in commercial activities. The representative office structure is most appropriate for non-profit trade associations and NGOs.

**Self-Dealing**

***Real estate***

Real estate companies owned by founders Chang Yu (常玉) and/or Teng Xiaorong (滕晓荣) have earned at least $4 million from China Agritech since 2004. Since its reverse merger, Agritech has been renting certain of its Harbin and Beijing premises from its founders, with the rent cost totaling more than $500,000 annually over the past few years. The premises are mostly empty. Agritech has also purchased real estate from its founders.

The Harbin factory has a rental agreement with the founders through the founders' company Harbin Yinlong. Since July 2005, rent has been 3.6 million RMB per year. Based on that rate, CAGC has paid more than $2.5 million in rent to companies controlled by Chang Yu and Teng Xiaorong since becoming a public company.

In 2007, the company began paying Ms. Teng 492,000 RMB annually to rent its office space in Beijing. Last August, the rental agreement was terminated, and the company paid Ms. Teng $1.49 million for the 750 square meter office space. The price was within the range of comparable real estate in Beijing. However, our visits to the office suggested that China Agritech did not need nor was utilizing 750 square meters of office space.

***Stock-Based Compensation***

Over the past twelve months, at least 200,000 registered insider shares have been sold by Ms. Teng, CFO Gareth Tang, and officer Zhu Mingfang (Steve Zhu) for a value exceeding $2.5 million.

***Company Background***

Company founders Mr. Chang and Ms. Teng formed Pacific Dragon in Harbin in 1994 to manufacture liquid and granular organic and chemical fertilizers.

In 2003, Mr. Chang and Ms. Teng incorporated a shell in Hong Kong called China Tailong Holdings to hold the equity of Pacific Dragon, the Harbin manufacturing plant where the company then produced about 5,000 tons of liquid fertilizer. Tailong acquired a 90% interest, and a PRC company held by Ms. Teng and Mr. Chang, called Yinlong Industrial or "Silver Dragon," held 10%.

Basic Empire Corp. in 2002 was the shell of a Nevada-based mining company originally called Argyle Mining. In May 2004, Timothy Halter, the reverse-merger specialist who founded the "Halter USX Index," bought majority control of the company for $200,000. In February 2005, the company completed a reverse acquisition with a Hong Kong corporation that had been established by company

founders Mr. Chang Yu and Ms. Teng Xiaorong. On May 12, 2005, the company's name was changed to China Agritech. A private placement in June of that year preceded a January 2006 offering that raised $11 million.

In May 2009, Tailong agreed to acquire the 10% balance of Yinlong's interest in Pacific Dragon for $1 million in cash plus 1.745 million new shares for the two founders.

***Executives, directors, and service companies***

***Gareth Yau-Sing Tang, CFO:*** Gareth Tang has a history of improper insider transactions. From 2003 to 2005, Tang was CFO of a small company quoted on Pink Sheets called China Cable and Communication Inc. (formerly CCCI.ob, now CCCI.pk). CCCI was a dubious venture, built around a cable TV system with 200,000 subscribers in the city of Baoding in Hebei Province. During his tenure as CFO, Mr. Tang took at least $1.5 million in share sale proceeds from the company and received shares worth more than $50,000 per month of his tenure. Mr. Tang's last stock sale came in September 2005, shortly before CCCI stopped reporting to the SEC and, for all intents and purposes, disappeared. The investor Isaac Silbermann, writing in Seeking Alpha, discussed Mr. Tang's earlier history as CEO of a Hong Kong-listed company called China Prosperity Holdings.[v] Essentially, Mr. Tang bought up cheap shares in a defunct Hong Kong-listed shell. Then a rumor that the company would receive the right to operate the first media joint venture on the mainland sent the

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[v] Isaac Silberman: "China Agritech: Questioning Management's Credibility," October 5, 2010, http://seekingalpha.com/article/228751-china-agritech-questioning-management-s-credibility-part-2

share price soaring. After heavy insider trading, the company announced that the venture had been aborted and did not disclose a reason.

***Linda Lingxiao Dai, Vice President of Finance:*** Ms. Dai's previous position is listed as CFO of the China branch of American Yellowstone Power Co. But searches turn up no record of a company of that name in China or in the United States. The closest name that can be found in Chinese translates as Yellowstone Resources, but there is no record of Ms. Dai having been associated with that company.

***Gene Michael Bennett, Director, Chairman of Audit Committee:*** Formerly a CPA with Grant Thornton, Gene Michael Bennett is or has been a director of China Shen Zhou Mining & Resources (SHZ), China Pharma Holdings (CPHI), China Fire & Security Group, Inc. (CFSG), and China Shenghuo Pharmaceutical Holdings, Inc. (KUN).

- KUN recently agreed to settle with shareholders who had filed a lawsuit for damages due to false and misleading statements by the company.[vi]
- China Fire & Security Group Inc. is a questionable business that is associated with a group of middlemen and service companies that have been connected in the past to stock manipulation.[vii]

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[vi] Shareholders Foundation: http://shareholdersfoundation.com/case/china-shenghuo-pharmaceutical-holdings-agrees-settlement-shareholder-class-action

[vii] Chris Carey: "China Fire & Security Inc.", Share Sleuth, March 10, 2008, http://sharesleuth.com/investigations/2008/03/china-fire-security-group-inc/

***Auditors:*** Agritech was downgraded last September by boutique investment bank Chardan Capital Market because of Agritech's retention of sub-standard auditing firms. China Agritech originally retained Kabani & Co., the Los Angeles-based accountancy that audited the notoriously fraudulent Bodisen Biotech, an organic fertilizer company that was delisted in 2007, and China Green Agriculture (CGA), a firm which we believe also falsely reports its results to U.S. investors. Agritech ended its relationship with Kabani in April 2008 and retained Crowe Horwath LLP. After being downgraded for not choosing a "Big Four" auditor, Agritech last autumn appointed Ernst & Young Hua Ming, which is the joint venture that Ernst & Young was required to form in the early 1990s in order to access the Chinese market. "Big Four" firm Ernst & Young is an equity owner, but E&Y Hua Ming is an independent company.

Currently, we believe E&Y Hua Ming is going through all past audits and talking openly with management about how to present the 2010 results appropriately. Unfortunately, neither "Big Four" auditors nor their Chinese joint ventures can protect investors from carefully calculated fraud.

***Fundraising***

China Agritech has been active in the market for capital since going public in 2005.

- In January 2006, the company raised $11 million in a private placement.[viii]
- In July 2007, the company raised $13 million in another private placement.[ix]

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[viii] http://www.sec.gov/Archives/edgar/data/1166389/000120445906000024/chinaagretech8k.htm

- In October 2009, the company raised $14 million by issuing about 2.8 million new shares to Carlyle, through two of its Asia-based vehicles. Carlyle also received warrants, with additional warrants to be awarded in case CAGC missed certain growth targets. In late November, the company registered the Carlyle warrants for sale.
- In the June quarter of 2010, the company raised $31 million via a public offering and the exercise of the 2009 warrants.[x]

In total, the raises brought more than $70 million into China Agritech. However, fixed assets on the books of the company subsidiaries totaled only $2 million at the end of 2009. Although some investor relations companies associated with Chinese reverse mergers like to say that Chinese government audit reports are always wrong, the fact is that companies have no incentive to under-report their fixed assets. For one thing, depreciation decreases income taxes. For another, fixed assets are appraised by government agencies, are usually meticulously entered into the books, and are harder to fake than revenues. Finally, many benefits accrue to Chinese companies that register high levels of "registered capital," and fixed assets make it easier to raise the level of registered capital. Based on these facts plus our own inspection of Agritech plants, we have no reason to doubt that the company owns a mere $2 million in capital assets.

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[ix] http://www.sec.gov/Archives/edgar/data/1166389/000114420407035613/v080413_8k.htm

[x] http://www.sec.gov/Archives/edgar/data/1166389/000114420410043954/v193268_10q.htm

The company's own reports to the SEC indicate that the book value of its fixed assets was $8.3 million at the end of the September quarter in 2010.

Rodman & Renshaw handled the public offering in April 2010 of 1.24 million shares of CAGC stock, raising almost $19 million. The money was intended for the buildout of distribution centers, Agritech said. But the company by summer 2010 had still not received production permits for granular fertilizer, while demand for liquid fertilizers was limited. We have not been able to identify any distribution centers that were built with the share proceeds.

**Conclusion**

Our careful examination of China Agritech's business indicates to us that along all parameters, Agritech has grossly inflated its revenue, failed to account for tens of millions of investor dollars, and now has virtually no product in the market. We believe this company should not be listed on NASDAQ. Fundamentally, CAGC is worth no more than the $2-per-share cash that is still in the company's accounts – if insiders don't empty it first.

**Aronson Declaration Exhibit 5**

**Bronte Capital**
It's a small world but I wouldn't want to paint it

Tuesday, February 15, 2011

**China Agritech: China's amazing productivity levels**

China Agritech has put out an eight page shareholder letter rebutting claims of short sellers. Readers know that in the past I have been inclined to take such letters under extreme caution.

But in this case I take the company statements as the gospel truth. They illustrate just how miraculous Chinese productivity levels are.

Firstly China Agritech claim all their production facilities are working normally and give a few addresses. (The addresses differ from the addresses in the 10K – a new complication.) They also give some photos. Here are the photos given of the Anhui facility.

Anhui Facility—Total Factory Area approx. 5,000 Square Meters

Anhui Facility Loading Area

The gate to the Anhui facility is the same one photographed by Lucas McGee – the shortseller who put out the scathing note on China Agritech. [There has been some difficulty finding that facility.]

These photos from China Agritech – combined with the annual report – allows us to illustrate amazing total factor productivity levels in China.

The annual report gives the company staff numbers:

> As of December 31, 2009, we had approximately 305 full-time employees, of which 45 were administrative and managerial staff; 150 were sales staff and 110 were manufacturing workers. We also hire temporary manufacturing workers to supplement our manufacture capabilities at periods of high demand.

The company has three dry fertilizer plants and a liquids plant. The Anhui plant however is half the total dry fertilizer – so at a guess it represents about

a third of the plant and equipment and a third of the staff. (This is just a good educated guess – but the analysis would apply to all the other plants as well.)

So let's suppose – just running these numbers – that say 37 staff work at the Anhui plant (that is a third of the manufacturing staff).

The Anhui plant – also according to the annual filing – produces 100 thousand (metric) tonnes of dry fertilizer per year. The bags in that photo are 40kg bags – so they produce 2.5 million bags per year – and they do all that with 37 staff.

The photograph – the elusive loading facility for which I searched – shows less than 100 bags – loosely – and I would guess manually – stacked on top of each other.

To move 2.5 million bags of fertilizer annually you would need an enormous army of manual workers whose muscles bulged like Popeye or machines. I presume you would use machines.

I am not a factory guy – but I presume fork-lifts would be pretty basic equipment. But if they used fork-lifts then the bags would be loaded onto pallets (again I am not a factory guy – but I am used to seeing pallets). Instead – and here is the photo again – they are stacked somewhat irregularly on the ground.

Anhui Facility Loading Area

These workers are amazingly strong. They move 2.5 million bags of fertilizer with nary a fork-lift.

Of course there could be some heavy moving kit outside the photo. So I went looking at the accounting for property plant and equipment. Here is an extract from the last annual:

7. PROPERTY, PLANT AND EQUIPMENT

Property, plant and equipment consist of the following:

| | As of December 31, | |
|---|---|---|
| | [illegible] | [illegible] |
| [illegible] | [illegible] | [illegible] |
| Manufacturing machinery | 5,849,894 | 4,735,761 |
| [illegible] | [illegible] | [illegible] |
| Office equipment | 223,298 | 220,031 |
| [illegible] | [illegible] | [illegible] |
| | [illegible] | [illegible] |
| Less: Accumulated depreciation and amortization | [illegible] | [illegible] |
| Net book value | [illegible] | [illegible] |

Depreciation and amortization expense for the years ended December 31, 2009 and 2008 was $695,703 and $548,571, respectively

Yes – that is 5.8 million of gross manufacturing equipment and 0.6 million of vehicles. A third of that equipment (my estimate) should be at Anhui.

So with just over $2 million worth of equipment the company claims to be able to manufacture and load

2.5 million bags of fertilizer per year. Oh, and they do without an enormous army of low-paid workers – but a mere thirty-something superheros.

America is forever stuffed. Westerners can never compete against this.

John

Disclosure: Bronte remains short China Agritech (indicating we do not think the above calculation should be taken very seriously except as an exploration of the accounts and claims of the company). "Anne" Wang Zheng – the Carlyle nominee China Agritech's board has still not got back to me. Perhaps she can shed more light on these amazing productivity levels.

**Aronson Declaration Exhibit 27**

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 68060 / October 17, 2012**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15069**

---

**In the Matter of China Agritech, Inc.,**
**Respondent.**

---

# ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 12(j) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, IMPOSING A CEASE-AND-DESIST ORDER, AND REVOKING REGISTRATION OF SECURITIES

## I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 12(j) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against China Agritech, Inc. ("China Agritech" or "Respondent").

## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 12(j) and 21C of the Securities Exchange Act of 1934, Making Findings, Imposing a Cease-and-Desist Order, and Revoking Registration of Securities (the "Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

## FACTS

A. China Agritech is a Delaware corporation with headquarters in Beijing, China. China Agritech's filings with the Commission reported that China Agritech has operations in several locations in China, from which it manufactures and distributes organic fertilizers for sale throughout China. In September 2009, China Agritech registered its securities under Section 12(b) of the Exchange Act and listed on the NASDAQ Global Select Market ("NASDAQ"). On July 13, 2011, NASDAQ filed a Form 25 with the Commission removing China Agritech's securities

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

from listing on NASDAQ and from registration under Section 12(b) of the Exchange Act. Since effectiveness of the deregistration from Section 12(b) of the Exchange Act, China Agritech's securities have been registered under Section 12(g) of the Exchange Act and quoted on OTC Pink under the symbol "CAGC."

B. China Agritech last filed a periodic report on November 10, 2010, when it filed a quarterly report on Form 10-Q for the quarter ended September 30, 2010. Since that time, China Agritech has failed to file annual reports on Form 10-K for the fiscal years ended December 31, 2010 and December 31, 2011, and has failed to file quarterly reports on Form 10-Q for the quarters ended March 31, 2011; June 30, 2011; September 30, 2011; March 31, 2012; and June 30, 2012.

C. On March 16, 2011, China Agritech filed a Form NT 10-K as required under Exchange Act Rule 12b-25, formally notifying the Commission that its 2010 Form 10-K would be delayed "due to a delay in obtaining and compiling information required to be included in the Company's Form 10-K." China Agritech has failed to file Forms NT 10-K or NT 10-Q for its delinquent annual report on Form 10-K for the fiscal year ended December 31, 2011 and its quarterly reports on Form 10-Q for the quarters ended March 31, 2011; June 30, 2011; September 30, 2011; March 31, 2012; and June 30, 2012, or provided the reasons for those delinquencies.

D. China Agritech belatedly disclosed in a Form 8-K filed on June 14, 2012, that one of the independent members of its Board of Directors had resigned effective January 25, 2012 and that two other independent directors had resigned effective March 15, 2012.

## VIOLATIONS

E. As a result of the conduct described in paragraphs A and B, above, China Agritech has failed to comply with, and committed violations of, Section 13(a) of the Exchange Act and Rules 13a-1, and 13a-13 thereunder, which require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current financial information in annual and quarterly reports.

F. As a result of the conduct described in paragraph C, above, China Agritech has also failed to comply with, and committed violations of, Section 13(a) of the Exchange Act and Rule 12b-25 thereunder, which require any reporting issuer that will be unable to meet the filing deadline for a required periodic report to file, within one business day of the missed deadline, a formal notification declaring its inability to file and the reasons therefor in reasonable detail.

G. Finally, as a result of the conduct described in paragraph D, above, China Agritech has failed to comply with, and committed violations of, Section 13(a) of the Exchange Act and Rule 13a-11 thereunder, which require every reporting issuer to file current reports disclosing certain events within the time period specified on Form 8-K; Item 5.02(b) of Form 8-K requires registrants to report the fact that a director has resigned and the date of the resignation within four business days of the occurrence of the event.

## IV.

Section 21C(a) of the Exchange Act provides as follows:

> If the Commission finds, after notice and opportunity for hearing, that any person is

> violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.

Section 12(j) of the Exchange Act provides as follows:

> The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means of instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the foregoing, the Commission finds that it is necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

Accordingly, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that Respondent cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rules 12b-25, 13a-1, 13a-11, and 13a-13 thereunder.

IT IS FURTHER ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of Respondent's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. 2:14-CV-05083-RGK (PJWx)

MICHAEL H. RESH, ET AL.,
*Plaintiff,*

v.

CHINA AGRITECH, INC., ET AL.,
*Defendants.*

[Filed Oct. 17, 2014]

**[PROPOSED] ORDER GRANTING MOVANT CAGC INVESTOR GROUP'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVING ITS SELECTION OF LEAD COUNSEL [DENIED]**

The CAGC Investor Group, comprised of investors in defendant China Agritech, Inc. ("China Agritech") William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V., has moved this Court for appointment as Lead Plaintiff and for approval of its selection of counsel as Co-Lead Counsel for the proposed class. This Court, having considered the provisions of Section 21D(a)(3)(B) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B), the Motion of the CAGC Investor Group for Appointment as Lead Plaintiff and for Approval of Selection of Counsel, the Memorandum of Points and Authorities and the Declaration of Betsy C. Manifold, with exhibits, submitted in support thereof,

as well as any opposition and reply papers, hereby orders as follows:

Pursuant to Section 21D(a)(3)(B) of the PSLRA, the CAGC Investor Group is the "most adequate plaintiff" and otherwise satisfies the requirements of § 21D of the PSLRA. The PSLRA specifically provides, *inter alia*, that the most-adequate plaintiff to serve as lead plaintiff is the person or group of persons to: (1) timely file a motion in response to a notice; (2) have the largest financial interest in the relief sought by the proposed class; and (3) make a *prima facie* showing which satisfies the pertinent requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

Here, the CAGC Investor Group timely filed its motion on September 3, 2014, sixty days after the notice of pendency of action was published on July 5, 2014. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). In addition, the CAGC Investor Group has calculated its losses under the guidelines of the United States Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) by disregarding transactions that are opened and closed that do not straddle a corrective disclosure and the losses resulting from any such transactions. *Id.* at 342-43. *See also Brown v. China Integrated Energy, Inc.*, No. 11-02559, 2011 U.S. Dist. LEXIS 151131, at *41-42 (C.D. Cal. Aug. 29, 2011); *Schueneman v. Arena Pharms., Inc.*, No. 10-1959, 2011 U.S. Dist. LEXIS 87373, at *13 (S.D. Cal. Aug. 8, 2011). Based on these calculations, the CAGC Investor Group has the largest financial interest in this litigation. In addition, the Court finds appointment of this small cohesive group of investors, of which the principles of the entities are business partners unrelated to this litigation, appropriate under Ninth Circuit law. *See, e.g., Petrie v. Elec.*

*Game Card, Inc.*, No. 10-0252, 2010 U.S. Dist. LEXIS 56283, at *7 (C.D. Cal. June 4, 2010) (allowing a group of three investors to aggregate their losses); *Leevan v. Credit Suisse Int'l*, No. 13-2783, 2013 U.S. Dist. LEXIS 172414, at *11 (N.D. Cal. Dec. 5, 2013) (appointing a group of three investors); *In re Versata Inc. Sec. Litig.*, No. 01-1439, 2001 U.S. Dist. LEXIS 24270, at *22 (N.D. Cal. Aug. 17, 2001) (appointing a group of three unrelated investors and noting that "under appropriate circumstances small groups, whether or not they have any pre-litigation relationship, can aggregate their financial losses.").

The Court additionally finds that the CAGC Investor Group has satisfied each of the other requirements of the PSLRA by providing the requisite signed certifications of each member of the group under oath with regard to their transactions and responsibilities, and making the required *prima facie* showing that they are adequate and typical members of the proposed class. *See* 15 U.S.C. § 78u-4(a)(2)(A)(i-vi) and 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). *See also In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002); *Hannon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Here, like all proposed class members, the CAGC Investor Group allegedly suffered damages from purchases of China Agritech stock during the relevant time period while Defendants made false and misleading representations concerning the Company in violation of Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder, such that the CAGC Investor Group's interests are aligned with those of the members of the proposed class, and there is no evidence of any antagonism between the two. As such, the CAGC Investor Group's claims are typical of the claims of the Class within the meaning

of Rule 23(a)(3), and they will fairly and adequately represent the interests of the Class under Rule 23(a)(4). *See Yanek v. Staar Surgical Co.*, No. 04-8007, 2004 U.S. Dist. LEXIS 30953, at *15, *16, *20 (C.D. Cal. Dec. 15, 2004).

Therefore, the Court hereby grants the CAGC Investor Group's Motion and appoints it to be Lead Plaintiff in this action and to represent the interests of the proposed class.

Pursuant to Section 21D(a)(3)(B)(v) of the PSLRA, 15 U.S.C. § 78u-4(a)(3)(B)(v), the Lead Plaintiff has selected and retained the law firms of Wolf Haldenstein Adler Freeman & Herz LLP and Brower Piven, A Professional Corporation to serve as Co-Lead Counsel. The Court therefore approves the CAGC Investor Group's selection of Co-Lead Counsel.

Co-Lead Counsel shall have the following responsibilities and duties, to be carried out personally:

a. to coordinate the briefing and argument of any and all motions;

b. to coordinate the conduct of any and all discovery proceedings;

c. to coordinate the examination of any and all witnesses in depositions;

d. to coordinate the selection of counsel to act as spokesperson at all pretrial conferences;

e. to call meetings of the plaintiffs' counsel as they deem necessary and appropriate from time to time;

f. to coordinate all settlement negotiations with counsel for defendants;

g. to coordinate and direct the pretrial discovery proceedings and the preparation for trial and the trial of this matter and to delegate work

responsibilities to selected counsel as may be required;

h. to coordinate the preparation and filings of all pleadings; and

i. to supervise all other matters concerning the prosecution or resolution of the action.

No motion, discovery request or other pretrial proceedings shall be initiated or filed by any plaintiffs without the approval of Co-Lead Counsel, so as to prevent duplicative pleadings or discovery by plaintiffs. No settlement negotiations shall be conducted without the approval of Co-Lead Counsel.

Co-Lead Counsel shall have the responsibility of receiving and disseminating Court orders and notices.

Co-Lead Counsel shall be the contact between plaintiffs' counsel and defendants' counsel, as well as the spokesperson for all plaintiffs' counsel, and shall direct and coordinate the activities of plaintiffs' counsel.

Lead Plaintiff shall effectuate service of papers on defendants by serving copies on each of their counsel by overnight delivery service, electronic mail or hand delivery.

Each attorney not a member of the Bar of this Court who is acting as counsel for a plaintiff or defendant herein shall be deemed admitted pro hac vice to practice before this Court in connection with these proceedings.

Lead Plaintiff shall file an amended complaint no later than 30 days from the date of the entry of this Order, unless otherwise agreed between the parties or ordered by the Court. All defendants shall have 30 days after the filing and service of the amended complaint to answer or otherwise respond, unless

otherwise agreed to between the parties and approved by the Court.

**IT IS SO ORDERED.**

DATED: OCT 17, 2014

[Handwritten:] Denied without prejudice to be determined at the time of certification

/s/ GARY KLAUSNER

HONORABLE R. GARY KLAUSNER
UNITED STATES DISTRICT COURT JUDGE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| | |
|---|---|
| Date | January 7, 2015 |
| Case No. | CV 14-05083 RGK (PJWx) |
| Title | ***RESH, et al. v. CHINA AGRITECH, INC., et al.*** |

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)
Deputy Clerk

Not Reported
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

**Proceedings: (IN CHAMBERS) Order Re: Dismissal Order as to Plaintiffs' Claims Against Remaining Defendants**

On September 4, 2014, Michael H. Resh ("Resh"), William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V. (collectively, "Plaintiffs") filed an Amended Class Action Complaint ("FAC") against China Agritech, Inc. ("China AG"), Charles Law ("Law"), and the following other defendants: (1) Yu Chang, (2) Yau-Sing Tang, (3) Gene Michael Bennett, (4) Xiao Rong Teng, (5) Ming Fang Zhu, (6) Lun Zhang Dai, (7) Hai Lin Zhang, and (8) Zheng Anne Wang (collectively, the "Remaining Defendants").

On December 1, 2014, the Court granted motions to dismiss filed by China AG and Law pursuant to Federal Rule of Civil Procedure 12(b)(6), finding that Plaintiffs' class action claims were barred by the statute of limitations. The Court ordered Plaintiffs to show cause as to why the Remaining Defendants should not also be dismissed from this action. On December 8, 2014, Plaintiffs filed a response to the Order.

Plaintiffs fail to provide an adequate reason why, in light of the Court's December 1, 2014 order, the claims against the Remaining Defendants should not also be dismissed. Therefore, the Court DISMISSES the Remaining Defendants.

Plaintiffs are not prevented from filing a complaint asserting individual, rather than class action, claims against China AG, Law, and the Remaining Defendants if they so choose.

**IT IS SO ORDERED.**

_____ : _____

Initials of Preparer

_____

No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner,*
v.
MICHAEL RESH, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

Whether the tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period.

## PARTIES TO THE PROCEEDING

Petitioner, a defendant below, is China Agritech, Inc.

The other defendants in the court below—and "respondents by rule" here—are Yu Chang, Yau-Sing Tang, Gene Michael Bennett, Xiao Rong Teng, Ming Fang Zhu, Lun Zhang Dai, Hai Lin Zhang, Charles Law, and Zheng Anne Wang. Of these individual defendants, only Charles Law and Gene Michael Bennett were served.*

Respondents, plaintiffs below, are Michael Resh,** William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V.

## RULE 29.6 DISCLOSURE

China Agritech, Inc. has no parent corporation. Carlyle Asia Growth Partners IV, L.P. and CAGP IV Co-Investment, L.P., investment funds affiliated with The Carlyle Group, collectively own more than 10% of the stock of China Agritech, Inc.

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* Charles Law has since been dismissed with prejudice from this action.

** Mr. Resh is now deceased.

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## OPINIONS BELOW

The decision of the court of appeals is reported at 857 F.3d 994 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a–23a. The district court's opinion granting petitioner's motion to dismiss is unpublished but reported at 2014 WL 12599849 and is reprinted at Pet. App. 24a–37a. The district court's opinion denying respondents' motion for reconsideration is unpublished but reported at 2015 WL 12781246 and is reprinted at Pet. App. 38a–44a.

## JURISDICTION

The court of appeals issued its decision on May 24, 2017. Pet. App. 1a. The court denied rehearing on July 3, 2017. Pet. App. 45a. The petition for a writ of certiorari was filed on September 21, 2017, and granted on December 8, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

28 U.S.C. § 1658(b) provides, in relevant part: "[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

## INTRODUCTION

This is the third of three identical putative class actions alleging that petitioner China Agritech, Inc. ("China Ag") violated securities fraud provisions of the Securities Exchange Act of 1934. The first class

was not certified for lack of predominance under Rule 23(b)(3). The second class action failed because the named plaintiffs were found to be inadequate and atypical class representatives under Rule 23(a)(3) and (4).

Respondents—absent members of the first two classes—then filed a third (essentially identical) class action complaint. But the problem for respondents is that they filed their action outside the 2-year statute of limitations applicable to Exchange Act claims. The district court accordingly dismissed their class complaint as time-barred.

Respondents appealed, contending that their action was timely because the statute of limitations was tolled during the pendency of the first two putative class actions under the equitable tolling doctrine recognized in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Those cases hold that the statute of limitations is tolled during the pendency of a class action to allow absent class members to bring *individual* claims, as this Court's more recent precedents confirm. But plaintiffs argued—and the Ninth Circuit agreed—that the *American Pipe* rule also allows for tolling of otherwise untimely follow-on *class* actions.

The Ninth Circuit's extension of *American Pipe* is incorrect and should be reversed. *American Pipe* and *Crown, Cork* are consistent with the two fundamental elements of equitable tolling—plaintiff diligence and extraordinary circumstances. The Court explained in both cases that absent class members diligently seek to protect their rights when they rely

on a pending class action and assert their own claims if that representative action fails. The Court also recognized that an extraordinary justification existed that warranted tolling, because if the limitations period were not tolled while a putative class action is pending, then individuals would file protective claims and undermine Rule 23's policy of discouraging individual suits when a representative action is pending.

The Ninth Circuit's rule must be rejected because it impermissibly extends equitable tolling when the plaintiffs have not exercised diligence, and in a circumstance where the Rule 23 policies animating *American Pipe* do not apply. Extending *American Pipe* to follow-on class actions means tolling not just the named plaintiff's claims but also the claims of absent class members who remain absent after a putative class action fails—i.e., those absent class members who do not seek to protect their own rights through individual actions once there is no longer a representative action pending. Those class members have by definition slept on their rights and are thus not entitled to equity. And while Rule 23 disfavors widespread individual actions when a representative action is possible, neither that Rule nor any other provision disfavors the filing of more than one *class* action at the outset. To the contrary, Rule 23's preference for adequate class representatives and class counsel encourages all would-be class representatives to come forward early.

Indeed, this securities action is governed by the Private Securities Litigation Reform Act ("PSLRA"), which makes that preference explicit by requiring

class-wide notice at the outset of a suit (rather than after a class is certified) so that the district court can appoint the lead plaintiff and approve plaintiff's selection of counsel. That preference for early action is inconsistent with an equitable tolling rule that rewards potential class representatives who come forward only after other attempts at class-wide adjudication fail and the statute of limitations has run.

The Ninth Circuit's rule is thus inconsistent with basic principles of equitable tolling and with *American Pipe*, which is reason enough to reject it. But it is not the only reason. If ratified by this Court, the court of appeals' extension of *American Pipe* to follow-on class actions would lead to significant negative practical consequences, including most obviously that the Ninth Circuit's rule allows for perpetual stacking of one class action after another. That result would eviscerate the purpose of statutes of limitations, including promoting plaintiff diligence and granting defendants repose, yet even the court of appeals recognized that this was the logical implication of its decision. That court nevertheless adopted its rule because it believed that other doctrines would ameliorate this obvious harm. The Ninth Circuit was wrong, and in any event missed the point. There is no need to rely on other doctrines, because Congress has already chosen its preferred method of precluding repeated litigation of the same claim—i.e., by enacting a strict time limit that can only be extended in the rarest of circumstances. This Court should reject the Ninth Circuit's unprecedented and unwarranted expansion of equitable tolling princi-

ples and give effect to the time limitations that Congress enacted.

The decision below should be reversed.

## STATEMENT OF THE CASE

Respondents seek to bring the third of three materially identical class actions, each alleging that China Ag violated the Securities Exchange Act of 1934. Exchange Act claims such as respondents' must be brought within "2 years after the discovery of the facts constituting the violation," 28 U.S.C. § 1658(b), and it is undisputed that respondents' complaint was filed well outside that two-year period.

This Court has long held that statutes of limitations like § 1658(b) serve important congressional purposes—including promoting diligence by plaintiffs, providing repose for defendants, and alleviating the burden on the judicial system of having to adjudicate stale claims—and are thus strictly enforced. *See Gabelli v. SEC*, 568 U.S. 442, 448 (2013). The Court has also recognized, however, that in "extraordinary circumstances," statutes of limitations may be subject to equitable tolling. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). Respondents argue here that their class action complaint can proceed despite the statute of limitations based on the equitable tolling doctrine articulated in *American Pipe* and *Crown, Cork*.

*American Pipe* and *Crown, Cork* held that "plaintiff's timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans*

*Affairs*, 498 U.S. 89, 96 n.3 (1990) (emphasis added). The question presented here is whether the *American Pipe* rule should be expanded to also toll statutes of limitations to allow previously absent class members to bring *class* actions outside the applicable limitations period. The relevant factual background and procedural history are set forth below.

**A. Factual Background**

This suit is the last of three identical class actions brought on behalf of purchasers of China Ag common stock alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934.

1. *China Ag Stock*

China Ag manufactured and sold organic fertilizers, distributing its product to farmers in 28 Chinese provinces, as well as neighboring countries. DE 28-3, #405.[1] China Ag's stock was listed on the NASDAQ beginning in 2005. Pet. App. 3a. The company prospered in the years that followed, with reported revenues tripling from $25 million in 2005 to $76 million in 2009. *Id.*

In 2011, however, China Ag became a victim of short-seller attacks fueled by online "exposés." On February 3, 2011, someone calling himself "Lucas McGee" posted a report (the "LM Report") accusing China Ag of a litany of misdeeds—from being a shell company to allegedly overstating its revenue and concealing related-party transactions. Pet. App. 3a,

[1] All citations to "DE" refer to district court docket entries in this action, unless otherwise noted. Relevant pages of those entries are identified by the district court Page ID number.

27a. Another short seller, Bronte Capital, soon joined the assault, alleging that China Ag had grossly overstated the amount of fertilizer it was capable of producing. Pet. App. 3a–4a. The company's stock plummeted in light of these reports and approximately one month later—on March 14, 2011—the NASDAQ halted trading and began delisting proceedings. Pet. App. 4a.

2. *The* Dean *Action*

a. Unsurprisingly, the publicity just described—and the subsequent market reaction—resulted in a slew of private securities litigation. Any Exchange Act claim would have to be brought within "2 years after the discovery of the facts constituting the violation," 28 U.S.C. § 1658(b), but it took Theodore Dean, a China Ag shareholder, only eight days (until February 11, 2011) to file a class action against China Ag and various of its officers and directors alleging claims under both the Exchange Act and § 11 of the Securities Act of 1933. *See Dean v. China Agritech Inc.*, No. 2:11-cv-01331 (C.D. Cal.); Pet. App. 4a–5a.

b. Because Dean sought to lead a federal securities class action, his complaint was subject to the early notice requirements set forth in the PSLRA. That statute requires a securities class action plaintiff to promptly publish a notice alerting potential class members of the pendency of the action, the claims asserted, and the proposed class period and advising that any class member has the right to move the court to serve as lead plaintiff. *See* 15 U.S.C. § 78u–4(a)(3)(A)(i). This early notice is meant to encourage other potential class members who might like to lead the class themselves to come for-

ward to serve as lead plaintiffs early in the litigation, facilitating selection of the best possible lead plaintiffs. *See id.* § 78u–4(a)(3); Fed. R. Civ. P. 23(a), (g); *see also* H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.) ("These provisions are intended to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class.").

On the same day the complaint was filed, Dean's counsel posted the requisite notice through a global media platform called Business Wire, "a widely circulated national business-oriented publication," 15 U.S.C. § 78u-4(a)(3)(A)(i); *see* JA 274-76. A week later, Dean's counsel published a similar notice on GlobeNewswire. JA 277-80.

Nine shareholders responded and sought to be named lead plaintiffs. Pet. App. 5a; *Dean*, No. 2:11-cv-01331, DE 4, #33-34, DE 7, #118. Judge Klausner ruled that he would consider the lead plaintiff issue at the class certification hearing. *See* Pet. App. 5a; *Dean*, No. 2:11-cv-01331, DE 22, #281. Other shareholders who had filed their own class actions later voluntarily dismissed them based on *Dean*'s pendency. *See Calcagno v. China Agritech, Inc.*, No. 2:11-cv-02800 (C.D. Cal.); *Pepperdine v. China Agritech, Inc.*, No. 2:11-cv-01414 (C.D. Cal.).

c. Respondents were not in the group who filed their own class actions or sought to lead the *Dean* action.

Michael Resh (now deceased) was a self-proclaimed "internationally recognized Advisor[] in

the field of Securities Fraud Litigation." DE 28-4, #569. He was the Founder of ReshFitzgerald, a company "committed to monitoring through our investigative team of professional[s] potential securities fraud class actions." *Id.* at #572. His job was to closely track the stock market for potential fraud, so he could alert plaintiffs' lawyers about "the opportunity to represent the shareholder interest and initiate litigation." *Id.*

Resh purchased China Ag stock on February 22, 2011, shortly after the *Dean* notices were posted. DE 24-1, #297. But Resh did not bring an individual action or class action within the limitations period, nor did he seek to join or lead Dean's class action.

So too with respondent Heroca Holding. It evidently was watching China Ag's stock price closely in 2011—purchasing 20,000 shares on February 8 and February 23, selling 10,000 shares on February 25, and then buying 10,000 shares on March 11. *Id.* at #304. CAGC Investor Group, which consists of respondents Heroca Holding, William Schoenke, and Ninella Beheer, claims to have lost nearly half a million dollars. DE 22, #134 n.1, 139. Yet as with Resh, none of these respondents did anything to assert a claim until September 2014, well after the limitations period had run. *See infra* at 13.

d. On June 22, 2011, Dean, with four new named plaintiffs, filed an amended complaint. Pet. App. 5a. That complaint (like the complaint in this action) asserted claims under §§ 10(b) and 20(a) of the Exchange Act. *Id.* It also alleged Securities Act claims. *Id.* The district court dismissed the Securities Act claims on the pleadings, but allowed the Ex-

change Act claims to proceed to discovery. Pet. App. 6a.

On January 6, 2012, after ten months of discovery—including five separate expert reports—the *Dean* plaintiffs moved for class certification. On May 3, 2012, the district court denied the plaintiffs' motion. JA 177-92. The court first concluded that the *Dean* plaintiffs satisfied the requirements of Rule 23(a), including the requirements that they adequately represent the putative class's interests and that their claims be typical of the class's claims. JA 184-86.

But the Exchange Act claims were unsuitable for class treatment, the district court held, because plaintiffs were "unable to establish that questions of law or fact common to class members predominate over any questions affecting only individual members." JA 192 (citing Fed R. Civ. P. 23(b)(3)). That is, reliance could not be proven on a class-wide basis because plaintiffs had not established the prerequisites for a fraud-on-the-market presumption under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). JA 187-92. The district court reached this conclusion because plaintiffs' expert was "unable to establish that [China Ag] stock was traded on an efficient market." JA 192. The *Dean* plaintiffs filed a Rule 23(f) petition, which the Ninth Circuit summarily denied. Pet. App. 6a.

e. After class certification was denied, Dean's counsel published another notice. That notice explicitly informed shareholders—a pool that included respondents—that they needed to take immediate action if they wanted to preserve their claims:

> [T]he Court denied the plaintiffs' motion for class certification. As a result, your rights as a shareholder are no longer protected. *You must act yourself to protect your rights.* You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech.

JA 281-82 (emphasis added).

Still, respondents and the absent class members they now purport to represent did nothing. Over the next five months, during which the *Dean* plaintiffs continued litigating their case as individuals, respondents neither intervened nor brought their own action. The *Dean* plaintiffs settled their individual claims in September 2012, resulting in the action's dismissal. Pet. App. 6a.

3. *The* Smyth *Action*

On October 4, 2012, approximately three weeks after the district court's dismissal of the *Dean* action, another set of plaintiffs—represented by the same counsel that filed *Dean*—filed "an almost identical class-action complaint on behalf of the same would-be class against China Agritech." Pet. App. 7a; *see Smyth v. Chang*, No. 2:13-cv-03008 (C.D. Cal.). The *Smyth* plaintiffs originally filed suit in the District of Delaware and, after the required PSLRA notice was posted, eight shareholders sought to be appointed as lead counsel. Pet. App. 7a. Respondents were again not among that group.

*Smyth* was then transferred to the Central District of California, where it was designated as "relat-

ed" to *Dean* and assigned to Judge Klausner (the same district judge who presided over *Dean*). Pet. App. 7a. On July 18, 2013, the *Smyth* plaintiffs filed an amended complaint adding five named plaintiffs. *Id.*

The *Smyth* plaintiffs then moved to certify the class. China Ag argued that the district court should afford comity to its *Dean* decision. The district court rejected that argument and instead denied class certification based on plaintiffs' failure to satisfy the typicality and adequacy requirements of Rules 23(a)(3) and (a)(4). JA 255-65. The *Smyth* plaintiffs' claims were not typical of the class, the district court held, because their "prior relationship with the *Dean* plaintiffs"—with whom they shared counsel—subjected them to unique defenses. JA 255-60. Nor were they adequate, because there were "troubling, unanswered questions about the extent to which the Rosen Law Firm, rather than its clients, is directing this action." JA 260-62. The district court also denied the plaintiffs' motion to be appointed lead plaintiff. JA 265.

In January 2014 the *Smyth* plaintiffs voluntarily dismissed their suit without prejudice. Pet. App. 8a.

4. *This Action*

On June 30, 2014, respondent Michael Resh filed this proposed class action. That filing came more than 3 years after the LM Report was published. *See* Pet. App. 8a–9a. Resh again published the requisite PSLRA notice, DE 23-1, #155-56, and the case was again assigned to Judge Klausner.

Resh was joined two months later by the remaining respondents, who moved to intervene as lead plaintiffs. DE 22. All of the plaintiffs then filed an amended complaint on September 4, 2014. DE 24. That complaint was "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." Pet. App. 8a. No other class members filed suit (either an individual or class action), sought to be appointed as lead plaintiffs, or otherwise showed any interest in this case.

**B. Decisions Below**

This action was filed well after the applicable two-year statute of limitations had lapsed, but respondents contended that their new purported class action was nevertheless timely because the limitations period had been tolled during the pendency of the *Dean* and *Smyth* class actions under the *American Pipe* rule. China Ag responded that *American Pipe* allowed for tolling of the limitations period only for subsequent individual actions, not subsequent class actions. The district court agreed, but the Ninth Circuit reversed.

1. On December 1, 2014, the district court granted China Ag's motion to dismiss respondents' class-action complaint as untimely. The court noted that respondents did "not dispute that, absent the *Dean* and *Smyth* actions, the statute of limitations would have run by the time they filed their Complaint." Pet. App. 30a. And based on its reading of Ninth Circuit precedent, the district court held that *American Pipe* permitted respondents to bring their individual claims despite the running of the limitations

period, but not another class action. Pet. App. 30a–36a.

Respondents argued that Ninth Circuit tolling law applies "to the class action as long as class certification has not been previously denied on the ground that the claims were not suitable for class treatment." Pet. App. 32a. The district court rejected this reading of Ninth Circuit law, but also held that even if this were the rule, it would not help respondents, because the "Court previously denied certification of this same putative class in the *Dean* action on the ground that the claims were not suitable for class treatment," i.e., because respondents had "failed to establish the 'predominance' requirement of Rule 23(b)(3)." Pet. App. 35a. Respondents pointed to the court's conclusion in *Dean* that a fraud-on-the-market presumption was inappropriate as a flaw in the *Dean* plaintiffs' evidentiary presentation. They therefore "argue[d] that class certification was denied not because the claims were not suitable for class certification, but rather, because the plaintiffs failed to establish that the claims were not suitable for class certification." Pet. App. 36a (emphasis omitted). The district court rejected that attempt to recharacterize the court's predominance-based dismissal as a plaintiff-specific deficiency, "as it would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence." *Id.*

Respondents moved for reconsideration, and the district court denied the motion. Pet. App. 44a. The court emphasized that while any class action is time-

barred, respondents were "not prevented from filing a complaint asserting individual, rather than class action, claims . . . if they so choose." Pet. App. 42a (internal quotation marks omitted).

2. Respondents declined to pursue their individual claims, even though they claimed damages of nearly half-a-million dollars. *See* DE 22. They instead appealed, and the court of appeals reversed. The panel held that *American Pipe* tolls the limitations period to allow absent class members to bring not only their own individual claims, but also to bring otherwise untimely class actions—even when the district court previously found an identical class deficient. Pet. App. 15a–17a, 22a.

The court of appeals believed that its construction of *American Pipe* was compelled by three of this Court's recent cases, Pet. App. 17a–21a—two of which did not mention tolling at all, *see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), and one of which characterized *American Pipe* tolling as applicable only to individual claims, *see Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011). The court of appeals also acknowledged *Smith*'s holding, *id.* at 315, that preclusion does not apply to absent members of an uncertified class, Pet. App. 18a, so preclusion principles cannot prevent perpetual class actions.

The court further justified its holding by citing "policy objectives" that supposedly supported *American Pipe*'s rule. Pet. App. 21a. According to the Ninth Circuit, *American Pipe* should be extended to subsequent class actions because there is "no unfair

surprise to defendants" in being faced with yet another class action. *Id.* And although the court acknowledged that its rule could allow for limitless class action complaints over time, it concluded that its rule would ultimately promote "economy of litigation" by reducing incentives for protective class filings within the limitations period. *Id.*

Finally, the court of appeals recognized that its rule could invite "abusive filing of repetitive class actions," but asserted that three supposed safeguards were adequate to protect against such abuse. Pet. App. 22a. First, the panel said that self-restraint by the plaintiffs' bar would serve to limit class litigation abuse, hypothesizing that plaintiffs' counsel "will have little to gain from repeatedly filing new suits" where class certification is unlikely and accordingly that those attorneys "at some point will be unwilling to assume the financial risk in bringing successive suits." *Id.* Second, the court asserted that preclusion principles would provide some barrier to serial litigation, *id.*, despite acknowledging that preclusion does not apply to new class actions brought by previously absent members of an uncertified class (such as respondents). *Id.* Third, the panel explained that district courts could reject improper attempts to stack successive class actions by invoking "comity" to prior decisions denying class certification. *Id.*

## SUMMARY OF ARGUMENT

I. *American Pipe* tolls the statute of limitations during the pendency of a putative class action for absent class members to file *individual* claims if the class fails. The Ninth Circuit erred in extending

*American Pipe* to also toll the limitations period for follow-on class actions.

A. Statutes of limitations reflect a congressional judgment about when the need for finality outweighs the interest in protecting potential claims. This Court has long recognized that time bars protect important interests—including promoting plaintiff diligence, avoiding the burden on the judicial system imposed by stale claims, and providing defendants repose—and has thus strictly enforced them.

The Court has also recognized that Congress legislates against the background of equitable tradition, which includes the equitable tolling of limitations periods. But this Court has made clear that the availability of equitable tolling is strictly limited and cannot be extended beyond its historical reach. Particularly relevant here, tolling is precluded unless two elements are satisfied. First, the plaintiff seeking tolling must demonstrate that she acted diligently in protecting her rights. Second, the plaintiff must identify some other "extraordinary circumstance" that justifies tolling.

B. *American Pipe* and *Crown, Cork* announced a specific application of equitable tolling principles in the class action context, holding that statutes of limitations are tolled while a class action is pending to allow absent class members to assert *their own* claims if the class fails, either through intervention (*American Pipe*) or separate individual actions (*Crown, Cork*). These cases recognized an extraordinary justification for tolling: without tolling, plaintiffs who wanted to protect their rights would file protective individual actions while the potential

class is still pending and that would undermine Rule 23's policy of avoiding individual litigation when there is a potential for representative adjudication. In both cases, the Court explained that the beneficiaries of this tolling rule have acted diligently by reasonably relying on a pending class action to represent their rights and then filing individual claims if the class failed.

*American Pipe* and *Crown, Cork*, by both their explicit terms and their rationale, permit tolling for *individual* actions. Unsurprisingly, this Court has repeatedly recognized that the *American Pipe* rule tolls the limitations period for absent class members to file individual actions and thus protect their own individual rights.

C. The decision below extending *American Pipe* to follow-on class actions cannot be reconciled with fundamental principles of equitable tolling, class actions, and the separation of powers.

1. Plaintiff diligence has always been an absolute prerequisite for equitable tolling. *American Pipe* and *Crown, Cork* applied this principle, holding that absent class members do not sit on their rights when they rely on a pending class action and then file an individual claim if the class action fails. The Ninth Circuit's extension of *American Pipe* to class actions, by contrast, flouts this diligence requirement in two respects.

*First*, absent class members who do not file their own claims once the class fails and instead continue to remain absent obviously have not exercised any diligence at all. Yet the effect of extending *American*

*Pipe* to follow-on class actions is to toll the limitations period for every absent class member, none of whom has done anything to assert her own rights once the first class action failed nor otherwise showed any interest in the litigation. This failure of absent-class-member diligence suffices to reject the Ninth Circuit's rule.

*Second*, lead plaintiffs in a follow-on class action (such as respondents here) also necessarily failed to satisfy the diligence requirement. Tolling is appropriate for absent class members to assert individual claims because when a class action is pending, it is reasonable for an absent class member to rely on that potential class action to protect her rights. But it is plainly *unreasonable* for a class member whose goal is to represent the class to rely on another class representative. And that is especially so in securities litigation covered by the PSLRA, which requires notice to all class members so that any who wants to represent the class can come forward to allow the district court to pick the best lead plaintiffs. Securities-litigation class members like respondents thus have every opportunity and incentive to come forward early to lead the class. A failure to do so demonstrates a lack of diligence and thus precludes tolling.

2. The Ninth Circuit's rule independently fails because the necessary extraordinary circumstances that justified tolling in *American Pipe* do not apply to follow-on class actions.

Tolling was justified for individual claims because a contrary rule would undermine Rule 23 by inviting protective individual litigation while a class

action was still pending. The Ninth Circuit believed that its rule was similarly justified because it would discourage the filing of protective class actions. That is incorrect, because any class member who wants to represent the class already has every incentive to file a class action complaint early. And even if the court of appeals were correct that rejecting tolling would lead to the early filing of additional class actions, neither Rule 23 nor any other federal policy discourages that result. Federal courts are well equipped to handle multiple filings through, for example, consolidation and multi-district litigation procedures. And if anything, the filing of multiple class actions furthers Rule 23's policy of determining early whether class-wide litigation is warranted and identifying adequate representatives and class counsel. Certainly, the PSLRA embodies Congress's affirmative policy of encouraging potential lead plaintiffs to come forward early. If the Ninth Circuit's tolling rule creates the opposite incentive, as that court itself believes, then its decision should be rejected as inconsistent with the PSLRA.

The court of appeals also noted that its tolling rule would not prejudice defendants. But a lack of defendant prejudice can never itself justify tolling. The Ninth Circuit's evaluation of defendant prejudice is also wrong. Unlike with tolling for individual actions, which by its nature does not require costly class discovery and can result only in a limited tolling period, the Ninth Circuit's rule would result in unlimited tolling for one costly class action after the other. And the rule would create incentives for plaintiffs' counsel to file repetitive class actions—

such actions provide plaintiffs' attorneys with a high potential reward while putting tremendous pressure on defendants to settle even meritless claims. The prejudice resulting from this lack of repose is obvious, and it is flatly inconsistent with the policies animating statutes of limitations in the first place.

3. Finally, the Ninth Circuit's rule violates the separation of powers. This Court has long recognized that the doctrine of equitable tolling does not grant courts the general authority to set aside congressional time bars. Rather, equitable tolling is authorized *by Congress* because Congress drafts statutes of limitations against the historical rules governing equity. The Ninth Circuit's extension of *American Pipe* flouts those historical limitations for the reasons explained and thus improperly grants to courts rather than Congress the power to decide when claims are time-barred.

D. The Ninth Circuit's decision, if adopted by this Court, will also lead to significant adverse practical consequences. Most obviously, the Ninth Circuit's rule allows class actions to be stacked indefinitely—precisely the sort of abusive and endless litigation statutes of limitations are meant to preclude. The court of appeals acknowledged that the logic of its rule would lead to serial litigation, but believed that these effects would be mitigated by plaintiff-attorney self-restraint and the doctrines of preclusion and comity. The Ninth Circuit's conclusion is incorrect—none of these supposed impediments would materially ameliorate the harms caused by the court of appeals' rule. More important, even if the Ninth Circuit were right, Congress has already

determined that the appropriate way to cut off abusive litigation is through a statute of limitations, and the court of appeals erred in declining to give effect to that choice.

E. Finally, the Ninth Circuit misconstrued this Court's recent precedent as requiring the result below. Nothing in this Court's recent cases requires or even permits extending *American Pipe* tolling to follow-on class actions.

II. Even if there are circumstances under which *American Pipe* tolling can extend to follow-on class actions, tolling certainly should not apply when certification of the initial class was denied based on a class-wide (as opposed to plaintiff-specific) defect.

A. It would be inequitable to toll the limitations period to allow relitigation of class certification for at least three reasons.

First, tolling in those circumstances would be inconsistent with the premise of *American Pipe*. That decision held that tolling was authorized for individual actions because it was reasonable for absent class members to rely on the class mechanism to protect their rights until the class fails. But it is no longer reasonable for absent class members to continue to rely on a class action to protect their rights if a Court has already determined that class treatment is not permitted by Rule 23. Potential plaintiffs who continue to rely on such a class are necessarily sleeping on their rights and should not benefit from tolling.

Second, extending tolling to class actions when a class has already been found invalid would work a

substantial injustice. Relitigation of the validity of class certification would waste significant resources and would undermine confidence in the judicial system. There is no equity in extending the limitations period to allow for relitigation of already settled questions.

Third, there is no compelling justification for extending *American Pipe* to allow relitigation of the validity of class-wide adjudication. Absent class members who want to bring individual claims are already protected under *American Pipe* and have already received a full and fair opportunity to litigate whether the case may proceed as a class action. No equitable principle authorizes tolling in these circumstances.

B. This rule requires reversal because the *Dean* class action was rejected on predominance grounds—a class-based rather than plaintiff-specific reason for the denial of class certification.

The decision below should be reversed.

## ARGUMENT

*American Pipe* tolls statutes of limitations while a putative class action is pending to allow absent class members to bring their own individual claims if the class fails. That doctrine should not be extended to allow absent class members the benefit of tolling to bring new, otherwise untimely class actions. At the very least, tolling should not be available when (as here) the viability of the class has already been litigated and rejected. The court of appeals' contrary decision should be reversed.

## I. EQUITABLE TOLLING UNDER *AMERICAN PIPE* APPLIES ONLY TO PREVIOUSLY ABSENT CLASS MEMBERS' INDIVIDUAL ACTIONS AND SHOULD NOT BE EXTENDED TO OTHERWISE UNTIMELY CLASS ACTIONS.

### A. Statutes of Limitations Are Strictly Enforced, Subject Only to Narrow Equitable Tolling Principles.

1. Statutes of limitations reflect Congress's "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll. v. Ricks*, 449 U.S. 250, 260 (1980) (internal quotation marks omitted). Such statutorily prescribed time periods for bringing suit serve three related interests. First, they "encourage the plaintiff to pursue his rights diligently." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (internal quotation marks and alterations omitted). Second, they "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli*, 568 U.S. at 448 (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Third, they ensure "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," providing a measure of "repose." *Rotella v. Wood*, 528 U.S. 549, 555 (2000).

For all these reasons, this Court has long recognized that "strict adherence" to congressionally prescribed time limits is integral to the "evenhanded

administration of the law," *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam) (internal quotation marks omitted), and "vital to the welfare of society," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). *Accord Menominee*, 136 S. Ct. at 757; *Gabelli*, 568 U.S. at 448.

2. Congress is also presumed to "legislate[] against a background of common-law adjudicatory principles," including "[e]quitable tolling, a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), and *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)).

This Court has long made clear that the equitable tolling doctrine is not "an unregulated power of administering abstract justice at the expense of well-settled principles." *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873). Rather, because Congress is understood to legislate against the background of settled equitable tolling rules, equitable tolling is "fundamentally a question of statutory intent." *Lozano*, 134 S. Ct. at 1232. Thus, courts may not apply equitable tolling rules that "break with historic principles of equity." *Holmberg*, 327 U.S. at 395. And this Court has repeatedly rejected requests to fashion tolling rules that are "completely divorced from long-settled equitable-tolling principles." *Credit Suisse Secs. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012).

As explained in more detail below, these established equitable principles authorize tolling only

when the plaintiff "has been pursuing his rights diligently" *and* when tolling is otherwise justified by "extraordinary circumstances." *Menominee*, 136 S. Ct. at 755 (internal quotation marks omitted); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (equitable tolling can be invoked "only sparingly").

### B. *American Pipe* Recognized That Statutes of Limitations Are Equitably Tolled During the Pendency of a Class Action for Subsequent Individual Actions.

1. This case concerns equitable tolling in the class action context. In *American Pipe* and *Crown, Cork*, this Court recognized a specific "equitable tolling" rule applicable to class actions, *Irwin*, 498 U.S. at 96 & n.3, "grounded in the traditional equitable powers of the judiciary," *Cal. Pub. Emps. Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017); *accord Young v. United States*, 535 U.S. 43, 49 (2002). Those cases hold that when a class action is timely filed, the statute of limitations must be tolled as a matter of equity for absent class members who subsequently bring their own *individual* claims (either through new complaints or intervention in the pending action) that would otherwise be untimely. *See American Pipe*, 414 U.S. at 554; *Crown, Cork*, 462 U.S. at 354.

In *American Pipe*, the district court had denied certification of a timely filed class action for failure to prove numerosity, and absent class members subsequently sought to intervene in the named plaintiff's individual action after the limitations period had run. 414 U.S. at 543–44. The Court's concern

with dismissing such intervention as time-barred was that if the time to intervene were not tolled during the pendency of a class action, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553. The Court explained that "allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would" conflict with the policies established in Rule 23: it would result in "needless duplication of [intervention] motions" and "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.* at 553–54. At the same time, this tolling rule gave effect to the equitable requirement of diligence because it would not reward any plaintiff who "has slept on his rights." *Id.* at 554 (internal quotation marks omitted); *see also id.* at 561 (Blackmun, J., concurring) ("Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights."). Thus, the Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action" and who subsequently file a motion to intervene. *Id.* at 554.

*Crown, Cork* extended this reasoning to absent class members who later brought their own individual actions. The Court explained that just as with intervention, "unless the statute of limitations was

tolled [for individual claims] by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights," and individuals would have to bring their own claims "prior to the running of the statute of limitations . . . to ensure that their rights would not be lost in the event that class certification was denied." 462 U.S. at 350. This would result in "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. And the Court again emphasized that the rule would not reward any litigant who failed to exercise diligence: "Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Id.* at 352–53; *see also id.* at 344 (Powell, J., concurring) ("reiterate[ing] the views expressed by Justice BLACKMUN in" *American Pipe* that tolling should not apply to "members of the purported class who have slept on their rights"). Thus, the Court held that a timely filed class action tolls the limitations period "until class certification is denied," at which point "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

2. *American Pipe* and *Crown, Cork* are by their terms applicable only to *individual* claims of formerly absent class members. The tolling rule announced in those decisions, moreover, is based on a rationale applicable only to individual claims. The decisions authorized tolling only after determining that class

members who delay filing individual claims while a class action is pending "cannot be accused of sleeping on their rights," because Rule 23 "encourages class members to rely on the named plaintiffs to press *their claims*," *id.* at 352–53 (emphasis added)—i.e., absent class members' individual claims. That is why *Crown, Cork* explained that under the *American Pipe* rule, tolling applies "until class certification is denied," at which point "class members may choose to file *their own suits* or *to intervene as plaintiffs* in the pending action." *Id.* at 354 (emphasis added). Moreover, the principal reason for tolling the limitations period during the pendency of a class action is to prevent *individuals* from intervening or filing their own claims even though the class action represents their interests—a result that would conflict directly with Rule 23's policy favoring efficient representative litigation. *See American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 351.

It is not surprising, then, that this Court has consistently and without exception "described *American Pipe* as creating a tolling rule, necessary to permit the ensuing *individual actions* to proceed." *ANZ Secs.*, 137 S. Ct. at 2054–55 (emphasis added); *see also Smith*, 564 U.S. at 313 n.10 (describing *American Pipe* as holding that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*" (emphasis added)); *Irwin*, 498 U.S. at 96 n.3 (describing *American Pipe* as holding that "plaintiff's timely filing of a defective class action tolled the limitations period *as*

*to the individual claims* of purported class members" (emphasis added)).

The question in this case is whether the principles underlying *American Pipe* and *Crown, Cork* justify extending the tolling rule recognized in those cases to subsequent *class* actions brought by formerly absent class members. The answer, for the reasons explained below, is no.

### C. The Ninth Circuit's Decision Extending *American Pipe* to Follow-On Class Actions Is Inconsistent with Fundamental Principles of Equitable Tolling, Class Actions, and the Separation of Powers.

While this Court has repeatedly recognized that *American Pipe* only authorizes tolling during the pendency of a purported class action to allow formerly absent class members to press *individual* claims, the court of appeals extended *American Pipe* to allow formerly absent class members to bring an otherwise untimely *class* action. That decision must be reversed because it is inconsistent with the two bedrock elements of equitable tolling: plaintiff diligence and extraordinary circumstances justifying tolling. *See supra* at 25–26.

*American Pipe* and *Crown, Cork* tolling satisfies those elements. First, an absent class member acts diligently by relying on a pending class to represent her rights and then filing an individual claim when the class fails. Second, tolling of individual claims is necessary to avoid direct conflict with the policies underlying Rule 23, an extraordinary circumstance that justifies equitable extension of the limitations

period. A failure on either of these elements would require rejecting the court of appeals' rule. *See Menominee*, 136 S. Ct. at 755 (diligence and extraordinary circumstances are each "elements" of equitable tolling that must both be satisfied); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (same). But the court of appeals' rule flouts both: it authorizes tolling without diligence and identifies no federal policy that could provide the requisite extraordinary circumstance to justify tolling. Moreover, by extending *American Pipe* in a manner unmoored from these principles, the decision below undermines the separation of powers.

1. *Extending* American Pipe *to Class Actions Would Impermissibly Allow Tolling Absent Diligence.*

As explained above, *American Pipe* is a specific application of more general equitable tolling principles. *See supra* at 26–28. The *sine qua non* of equitable tolling has always been the requirement that a litigant pursue her rights diligently. As applied to individual actions, *American Pipe* and *Crown, Cork* are consistent with that requirement. The Ninth Circuit's expansion of *American Pipe* to follow-on class actions is not.

a. It is a "long-established principle[]" that the "lack of diligence precludes equity's operation." *Pace*, 544 U.S. at 419; *see also McQuiddy v. Ware*, 20 Wall. 14, 19 (1874) ("Equity always refuses to interfere" where the plaintiff has not been diligent "in the prosecution of rights."). That principle is "so fundamental and essential," in fact, that it has been regarded as a cardinal rule of equity, reflected in the

maxim "*Vigilantibus non dormientibus, aequitas subvenit*"—"equity aids the vigilant, not those who slumber on their rights." John N. Pomeroy, *A Treatise of Equity Jurisprudence, as Administered in the United States of America* § 363 (4th ed. 1907); Joseph Story, *Commentaries on Equity Jurisprudence* § 200a (12th ed. 1877) ("Courts of equity do not sit for the purpose of relieving parties . . . who refuse to exercise a reasonable diligence or discretion."); U. Blickensderfer, *Blackstone's Elements of Law Etc.* § 64.10 (1906) ("[N]othing can call [a court of equity] into activity but conscience, good faith and personal diligence.").

Diligence, Chief Justice Marshall observed, has been required "[f]rom the earliest ages." *Elmendorf v. Taylor*, 23 U.S. 152, 168 (1825). The rule was "repeatedly recognized in the British [chancery] courts," *Piatt v. Vattier*, 34 U.S. 405, 417 (1835), as early as 1767, when Lord Camden famously explained: "A court of equity . . . has always refused its aid to stale demands, where the party has slept upon his rights"; where "reasonable diligence" is "wanting, the court is passive and does nothing." *Smith v. Clay*, 3 Bro. Ch. Rep. 639, note (1767) (quoted by *Piatt*, 34 U.S. at 416–17). And the rule that equity aids only the diligent "has been acted on in the fullest manner by this court" since the country's founding, *Piatt*, 34 U.S. at 416–17; *see also, e.g., Lupton v. Janney*, 38 U.S. 381, 386 (1839) (Story, J.).

That rule applies fully to equitable tolling of statutes of limitations, *see, e.g., Menominee*, 136 S. Ct. at 755; *Credit Suisse*, 566 U.S. at 227; *Pace*, 544 U.S. at 419; *Rotella*, 528 U.S. at 560–61; *Irwin*, 498

U.S. at 96; *Baldwin*, 466 U.S. at 151; *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874). Equitable tolling, in other words, "has *always* been reserved only for parties who have pursued their rights diligently." *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1291 n.5 (11th Cir. 2002).

Indeed, this Court has explained that it would be "inequitable and inconsistent with the general purpose of statutes of limitations" to apply tolling where the plaintiff has not been "pursuing his rights diligently." *Credit Suisse*, 566 U.S. at 227 (internal quotation marks and alterations omitted). "Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to pursue his rights diligently." *CTS Corp.*, 134 S. Ct. at 2184 (internal quotation marks and alterations omitted); *see also, e.g.*, *Crown, Cork*, 462 U.S. at 352 ("Limitations periods are intended ... to prevent plaintiffs from sleeping on their rights."); *Ross v. Duval*, 38 U.S. 45, 47 (1839) ("[Statutes of limitations] quicken diligence by making it in some measure equivalent to right."). Tolling without diligence would thus necessarily subvert "the legislative purpose" behind any limitations period, *American Pipe*, 414 U.S. at 559, and conflict with centuries of jurisprudence.

b. *American Pipe* is fully consistent with—and certainly cannot be "divorced from"—this "long-settled equitable-tolling principle." *Credit Suisse*, 566 U.S at 227. *American Pipe* recognizes that a plaintiff who "has slept on his rights" is not entitled to equitable relief, *American Pipe*, 414 U.S. at 554 (internal quotation marks omitted), and *Crown, Cork*

explains why that fundamental element of equity is satisfied as to individual actions: "Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." 462 U.S. at 352–53. In other words, the *American Pipe* rule recognizes that plaintiffs who seek to assert their rights can "rely on the existence of the [representative] suit to protect their rights" while that representative suit is pending. *Id.* at 350.

Once the pending class action fails, however, the only way formerly absent class members can continue to satisfy the diligence requirement is by filing suit to enforce their own rights. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962) ("[F]iling [of a lawsuit] itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure."). Indeed, this diligence requirement is expressly set forth in both *American Pipe* and *Crown, Cork*. *American Pipe* holds that "the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene* after the court has found the suit inappropriate for class action status." 414 U.S. at 553 (emphasis added). And *Crown, Cork* makes clear that once the class action fails (and tolling ends), former putative class members must either "file their own suits or . . . intervene as plaintiffs in the pending action" to protect their rights. 462 U.S. at 354.

c. The court of appeals' rule, by contrast, cannot be reconciled with this diligence requirement, in two respects.

First, and most important, extending *American Pipe* tolling to allow follow-on class actions necessarily means tolling the statute of limitations not just for the named plaintiff, but also for absent members of the original (i.e., timely) class *who continue to remain absent*. Those still-absent class members who did not bring suit or intervene even when the class failed have never done anything to protect their rights, let alone demonstrated diligence in doing so. Class members *who seek to assert their rights* can seek the benefit of equitable tolling, but neither *American Pipe* nor any other plausible principle of equitable tolling would apply to absent class members who continue to sleep on theirs. Their claims should expire in accordance with the statute. The court of appeals' extension of *American Pipe* to follow-on class actions gives absent class members rights that Congress did not intend and is inconsistent with centuries of equity jurisprudence.

Second, formerly absent class members who belatedly seek to lead a class action have also failed to exercise diligence warranting equitable tolling. As just explained, the *American Pipe* rule is based on the recognition that an absent class member whose goal is to preserve her rights can reasonably choose to "rely" on a pending class action to do so until the action fails. *Crown, Cork*, 462 U.S. at 350. But if an absent class member's objective is not just to preserve her own rights but also to lead a class action, it simply makes no sense to say that she can rely on

the pending class action to further that aim. To the contrary, it is by definition *unreasonable* for a class member whose goal is to represent the class to instead rely on someone else to represent that class.

In other words, there is no reason why a diligent aspiring class representative would fail to come forward until after another class member tries and fails to represent a class (much less allowing it to occur two separate times, as happened here). Class members (like respondents) who seek to represent a class only after class certification has been litigated and denied cannot possibly be said to have acted with the diligence that equity requires.

And while a potential class representative's failure to file a class action within the limitations period precludes tolling in any circumstance, it demonstrates a particularly egregious lack of diligence in the context of securities litigation governed by the PSLRA, which expressly encourages any class member who wants to represent the class to come forward as early as possible, so that the court can choose the best lead plaintiff. In particular, the PSLRA requires that once a class action is filed, early notice must be provided to class members concerning the "pendency of the action, the claims asserted therein, and the purported class period," 15 U.S.C. § 78u-4(a)(3)(A)(i)(I), precisely so that other putative class members can promptly move to participate as lead plaintiffs, *id.* § 78u-4(a)(3)(B). The district court is then directed to select among the potential candidates those "most capable of adequately representing the interests" of the class, *id.* § 78u-4(a)(3)(B)(i), as well as competent lead counsel, *id.* § 74u-

4(a)(3)(B)(v); Fed. R. Civ. P. 23(g)(2). In light of those provisions, it is especially unreasonable for a plaintiff who seeks to lead a securities class action to not come forward and participate in the lead-plaintiff selection process and instead wait until the limitations period has run to file a class complaint.

This case demonstrates the point. There is no question that PSLRA class notice was provided at the outset of the *Dean* action, and that respondents were fully aware of the facts that would support the claims pressed in the current complaint. *See supra* at 7–8. Numerous shareholders responded to the *Dean* class notice and sought to be designated as lead plaintiff, but respondents did not. So while respondents' reliance on the class action might constitute sufficient diligence for their personal claim under *American Pipe*, it demonstrates no diligence in preserving the ability to assert claims on behalf of others.

2. *The Extraordinary Circumstances Articulated in* American Pipe *to Justify Tolling for Individual Actions Do Not Apply to Tolling for Class Actions.*

That the Ninth Circuit's rule impermissibly authorizes tolling for non-diligent absent class members is reason enough to reject it. But diligence alone would not suffice; this Court has explained that some "extraordinary circumstance" must also justify tolling. *See, e.g.*, *Menominee*, 136 S. Ct. at 755; *ANZ Secs.*, 137 S. Ct. at 2052. Particularly relevant here, this Court has recognized that tolling is appropriate if it is necessary to protect an important policy embedded in a federal statute. *See, e.g.*, *Bur-*

*nett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434–36 (1965) (tolling of federal FELA statute of limitations authorized during pendency of state-court FELA action based on "the interests of uniformity embodied in the Act"). *American Pipe* gave effect to this principle, holding that tolling for individual actions was necessary to safeguard the policies reflected in Rule 23. There is no similar justification for extending the *American Pipe* rule to class actions. If anything, the Ninth Circuit's rule contravenes federal policy, including Congress's preference for early participation of potential lead plaintiffs under Rule 23 and the PSLRA.

a. As explained, the primary policy consideration driving *American Pipe* was that without tolling, any absent class member who wanted to preserve the ability to bring an individual claim would be forced to file a protective suit (or motion to intervene) while the putative class suit was pending. This Court explained that such a "multiplicity" of individual actions would frustrate the "principal purpose" of Rule 23—i.e., promoting judicial economy by discouraging individual actions when a representative action is pending. *American Pipe*, 414 U.S. at 551; *see also Crown, Cork*, 462 U.S. at 351. That concern by its terms does not justify tolling for subsequent class actions.

The court of appeals, however, believed that extending *American Pipe* to class actions is justified by the fear that rejecting tolling would result in "duplicative, protective class actions." Pet. App. 21a. That concern is misplaced for three reasons.

First, there is simply no reason to believe that enforcing statutes of limitations as to class actions will result in protective class filings. That concern was certainly reasonable for individual filings during the pendency of a putative class action: if absent class members believed that they could not rely on the pending suit to protect their rights, they would have to do so themselves by filing an individual action within the limitations period. Those people are protected under *American Pipe* regardless whether the tolling rule is extended to subsequent class actions.

The Ninth Circuit assumed that the same dynamic applies to class members who seek to represent the class. The court believed that tolling would cause such class members to wait to file a new class complaint until after the pending class action is adjudicated, while a lack of tolling would motivate them to file protective class complaints.

The assumption is incorrect. An individual who genuinely wants to represent the class—and not simply participate in a scheme to secure multiple bites at the class certification apple—*should not care about the outcome of this case.* Such an individual already has every incentive to file a class action (or intervene and seek to lead the pending action) as soon as possible regardless of any statute of limitations considerations, because failing to act early will almost certainly result in a different lead plaintiff's representation of the class. No one who wants to represent a class would reasonably rely on the pendency of an identical class action, since the existence of another such action does not protect—indeed, it undermines—the class member's ability to act as a

class representative. Thus, anyone who desires to represent a class would act promptly, regardless of tolling principles.

Second, and in any event, the Ninth Circuit's fear that enforcing statutes of limitations as to follow-on class actions will result in the filing of "protective" class actions is divorced from the policies underlying Rule 23. *American Pipe*, after all, was not concerned with the filing of protective individual actions in a vacuum—the problem the Court identified was that the proliferation of individual actions during the pendency of a potential class action is exactly what Rule 23 seeks to avoid. *American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 351.

Yet that is simply not true for the early filing of multiple class actions. Rule 23 emphasizes timely adjudication of a class's validity and focuses on ensuring that the class is adequately represented by the lead plaintiff and her counsel. *See, e.g.*, Fed. R. Civ. P. 23(c)(1)(A) (courts required to determine validity of class "[a]t an early practicable time"); Fed. R. Civ. P. 23(a)(4) (authorizing class certification only if "the representative parties will fairly and adequately protect the interests of the class"); Fed. R. Civ. P. 23(g)(2) (directing court to appoint lead class counsel "best able to represent the interests of the class"). The Rule thus *encourages* anyone who wants to represent the class to participate at the outset, rather than stepping up only if a first-mover's attempt fails. Rule 23 is intended to eliminate the need for a multiplicity of simultaneous individual suits when class-wide adjudication is possible, but it has no implicit or explicit aversion to the simultaneous filing

of multiple class actions. And indeed, the Ninth Circuit's chosen policy to avoid early potential-lead-plaintiff participation is *directly contrary* to Congress's pronouncement in the PSLRA that class members who seek to represent the class should come forward early to allow the district court to pick the best lead plaintiff. *See supra* at 7–8, 36–37. If the Ninth Circuit's rule undermines that result—as that court's own reasoning assumes—then it flatly contradicts express congressional policy and should be rejected out of hand.

Third, the answer to the Ninth Circuit's (misplaced) concern that enforcing statutes of limitations leads to the early filing of class actions is not to ignore those congressionally enacted time-bars but instead to employ the longstanding tools Congress has put in place for managing complex litigation. The U.S. Code and Federal Rules already provide tools to manage the existence of multiple class plaintiffs and class actions. *See Crown, Cork*, 462 U.S. at 353 (noting that "avenues exist by which the burdens of multiple lawsuits may be avoided"). For example, in securities cases the PSLRA anticipates the filing of multiple class action complaints at the outset of the litigation and requires the district court to consolidate those complaints before selecting the lead plaintiff. In non-securities cases, the Federal Rules of Civil Procedure allow district courts to consolidate multiple class actions pending in the same court. *See* Fed. R. Civ. P. 42(a). If multiple class actions are pending in different jurisdictions, they can be transferred to a single jurisdiction under 28 U.S.C. § 1404. Alternatively, "the Judicial Panel on Multi-

district Litigation has the authority to transfer related federal cases to one district court for consolidated and coordinated pretrial proceedings." *Manual for Complex Litigation, Fourth* § 21.15; *see* 28 U.S.C. § 1407. And even in the absence of formal coordination mechanisms, "[c]ourts rely on a variety of techniques to coordinate overlapping or duplicative [class actions], such as establishing coordinated schedules for discovery and the filing and briefing of motions." *Manual for Complex Litigation, Fourth* § 21.15. In other words, federal courts—largely because of tools Congress has provided them—are fully capable of managing multiple class actions. There is no basis for ignoring statutorily prescribed time limitations to solve a problem that does not exist.

b. The Ninth Circuit also held that its tolling rule was consistent with *American Pipe* because there is no "unfair surprise to defendants" in being subject to multiple class actions even after the limitations period has run, Pet. App. 21a, echoing *American Pipe*'s similar observation as to the rule authorizing tolling for individual actions, *see* 414 U.S. at 554. But that assertion is both irrelevant and wrong. As an initial matter, the absence of unfair surprise is not "an independent basis for invoking [tolling] and sanctioning deviations from established procedures"; rather, it is a policy rationale that supports tolling only "once a factor that might justify such tolling is identified." *Baldwin*, 466 U.S. at 152; *see also Menominee*, 136 S. Ct. at 757 n.5 ("[A]bsence of prejudice . . . is not an independent basis for invoking [tolling]." (internal quotation marks omit-

ted)). There is no justification for tolling here for the reasons already explained.

Moreover, and in any event, defendants would quite obviously be not only surprised but substantially prejudiced by a tolling rule applicable to follow-on class actions in a way they are not by allowing otherwise untimely individual actions once a class action fails.[2] For one thing, the time horizon for the filing of individual actions once a class action ends is finite—these actions must be filed before the tolled limitations period expires, and once they are litigated, any additional actions will be time-barred. The Ninth Circuit's rule, however, allows class actions to be stacked one after the other—tolling begins once a class action is filed, and then begins again once another one is filed, and so on. *See* Pet. App. 22a; *infra* at 46–47. No defendant expects to be subject to potentially perpetual class actions despite the existence of a statute of limitations. The prejudice to defendants is obvious, as is the inconsistency with the "basic policies of all limitations provisions:

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[2] In truth, China Ag was surprised here because the court of appeals disregarded its precedent to toll the limitations period in this case. The *en banc* Ninth Circuit had earlier interpreted American Pipe "not to allow tolling when the district court in the previous action had denied class certification, and when the second action sought to relitigate the issue of class certification and thereby to circumvent the earlier denial." *Catholic Social Servs., Inc. v. INS*, 232 F.3d 1139, 1147 (9th Cir. 2000). That is precisely what happened here, *see infra* Part II.B, yet the court of appeals extended *American Pipe* to follow-on class actions in all circumstances. The court of appeals believed that its new construction of *American Pipe* is mandated by this Court's recent precedents, but that is incorrect for the reasons explained below.

repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555.

Moreover, requiring defendants to litigate additional class actions is categorically different from requiring them to litigate additional individual actions. For one thing, the process of class discovery and class certification is expensive and time-consuming.

For another, allowing continuous class actions even after the limitations period has run creates incentives for plaintiffs' attorneys to continue to bring even meritless class claims, and for defendants to settle them. The payoff to plaintiffs' attorneys from successfully certifying a class, even a class that would pursue likely meritless claims, is immense. As this Court has repeatedly recognized, the mere pendency of a class action imposes substantial settlement pressure on the defendant. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies."). This dynamic is magnified by the prospect of relitigation of class certification. As Professor Redish has explained, the prospect of repeatedly litigating the validity of the same class "enables plaintiffs' lawyers to use the class device as a

means of legalized blackmail"; because the prospect of class certification never disappears, "defendants are effectively forced to 'buy' peace, even where such payments are wholly undeserved, by settling." Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, 32 Envtl. L. Rep. (Envtl. Law Inst.) 10984, 10986 (Aug. 2002). Thus, unlike with individual actions, the Ninth Circuit's rule extending *American Pipe* to follow-on class actions extends indefinitely the asymmetric incentives and settlement pressures inherent in class litigation. This result, again, prejudices defendants and is irreconcilable with the fundamental purposes of statutes of limitations.

3. *Extending* American Pipe *to Follow-On Class Actions Is Inconsistent with Basic Separation-of-Powers Principles.*

Extending *American Pipe* tolling to follow-on class actions also would be inconsistent with the fundamental separation-of-powers principle that courts may not "override the statute of limitations Congress prescribed," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014), or "make the law instead of administering it," *Gabelli*, 568 U.S. at 454 (internal quotation marks omitted). As detailed above, Congress enacts statutes of limitations on the understanding that courts will enforce the historical limits of equity (e.g., the requirements of plaintiff diligence and extraordinary circumstances) and give effect to specific applications of equitable principles (e.g., *American Pipe*) rather than expanding them beyond recognition.

The Ninth Circuit fails this fundamental separation-of-powers test. For the reasons explained, the court of appeals' decision expanding *American Pipe* to toll the limitations period during the pendency of a class action to allow absent class members subsequently to bring new, otherwise untimely class claims cannot be reconciled with the traditional requirements of equity. To the contrary, the rule rewards plaintiffs and absent class members who sit on their rights. And it cannot be justified by the Rule 23 policies that animate *American Pipe*. The Court could thus affirm the decision below only by expanding the historical understanding of equity and the reasoning of *American Pipe*—a result foreclosed by the separation-of-powers rule that Congress and not this Court determines when claims are time-barred.

### D. Extending *American Pipe* to Follow-On Class Actions Would Undermine the Policies Embodied in Statutes of Limitations and Result in Significant Adverse Practical Consequences.

1. The court of appeals' rule would also result in serious adverse policy consequences not present when tolling is limited to individual actions.

As then-Judge Alito recognized, the tolling rule the Ninth Circuit adopted below "could extend the statute of limitations almost indefinitely" by tolling it every time a new class action is filed. *Yang v. Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J., concurring in part). The court of appeals' perpetual tolling rule, in other words, "would allow a purported class almost limitless bites at the apple as it contin-

uously substitutes named plaintiffs and relitigates the class certification issue." *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1326 (11th Cir. 2015).

Allowing "stacked" class actions would thus effectively eviscerate the limitations period for class litigation and would fundamentally undermine the most basic purposes of statutes of limitations, including plaintiff diligence, defendant repose, and the elimination of stale claims. *See supra* at 24. As this Court has already explained: "The potential for . . . endless tolling in cases in which a reasonably diligent plaintiff would know of the facts underlying the action is out of step with the purpose of limitations periods in general." *Credit Suisse*, 566 U.S. at 227–28; *see also ANZ Secs.*, 137 S. Ct. at 2054 ("The limitless nature of petitioner's argument . . . reveals its implausibility."). The *American Pipe* rule as this Court has always understood it—i.e., as applying only to individual claims—creates no similar harm.

2. Even the Ninth Circuit did not dispute that its perpetual-tolling rule raised the potential for "abusive filing of repetitive class actions." Pet. App. 22a. It concluded, however, that preclusion, attorney self-restraint, and comity were sufficient to prevent perpetual class actions. *Id.* The Ninth Circuit is wrong thrice over.

a. Preclusion principles cannot prevent serial relitigation of class actions even when the validity of class certification has already been litigated and rejected. This Court held in *Smith* that preclusion principles do not apply to class certification decisions because preclusion does not apply to absent class

members unless and until a class is certified. *See* 564 U.S. at 313–15. Thus, however the court of appeals believed that "principles of preclusion" might apply, they cannot apply to limit abusive relitigation of the validity of class certification. The proper mechanism to avoid such abusive litigation is to give effect to the statutes of limitations that Congress enacted and that courts are bound to enforce.

b. The court of appeals next concluded that plaintiffs' attorneys are likely to exhibit self-restraint and refrain from filing new class actions when previous ones have failed. Pet. App. 22a. This is a particularly odd case in which to come to such a counterintuitive conclusion, since it is the *third* of three identical class actions. And in truth, the court of appeals' decision creates just the opposite incentives. As explained earlier, the very prospect of repeated relitigation of class certification only strengthens the already strong incentives defendants have to avoid the high costs of class discovery—and the even higher potential liability that would arise if class certification were granted—by settling even meritless claims. *See supra* at 44–45. Thus, the fact that similar class litigation has failed in the past will not dissuade plaintiffs' counsel from trying again, since even meritless claims may result in lucrative settlements. Again, the way to avoid that result is by foreclosing additional class litigation completely once the congressionally prescribed time bar has run—precisely the solution the court of appeals inexplicably rejected.

c. Finally, the Ninth Circuit believed that judicial comity will prevent the otherwise adverse consequences of serial class litigation.

As an initial matter, comity is no substitute for a statutory time bar. "The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination" inherent in the determination whether to grant comity to the decision of another court. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). It is one thing to equitably toll the limitations period for a short and finite period to allow individuals to bring their own claims. But a rule allowing a string of previously absent class members to try their hand at certifying a class, subject only to judicial discretion, is flatly inconsistent with Congress's judgment in enacting a statute of limitations in the first place.

And whatever protection judicial comity might provide against abusive litigation would be weak at best. Comity requires courts only to "pay respectful attention to the decision of another judge in a materially identical case, but not more than that even if it is a judge of the same court or a judge of a different court within the same judiciary." *Smentek v. Dart*, 683 F.3d 373, 377 (7th Cir. 2012). There is no reason to believe that this loose doctrine would provide any material protection against the abuse the Ninth Circuit's rule invites.

This case illustrates the point. After Judge Klausner denied class certification on predominance

grounds in *Dean*, Smyth filed "an almost identical class-action complaint on behalf of the same would-be class against China Agritech in federal district Court for the District of Delaware." Pet. App. 7a. The Delaware court transferred the case back to the district court below under 28 U.S.C. § 1404(a), but when the case was reassigned to Judge Klausner, he *rejected* petitioner's argument that the class allegations should be stricken as a matter of comity to his own prior denial of class certification. *See* JA 263-64. In other words, the doctrine of comity may not preclude relitigation of class certification *even before the same judge*. What does preclude such abuse is the vehicle Congress chose here—the statute's "generally hard and fast" time bar. *SCA Hygiene*, 137 S. Ct. at 960. This Court should give effect to Congress's determination and reverse the decision below.

### E. The Ninth Circuit Erred in Relying on this Court's Precedents to Extend *American Pipe* to Follow-On Class Actions.

The court of appeals believed that three recent precedents of this Court compelled it to hold that *American Pipe* tolls the limitations period during the pendency of a class action not only for absent class members to file individual claims but also for them to file duplicative class actions. Pet. App. 17a-21a. The Ninth Circuit misconstrued this Court's cases.

One of those cases—*Tyson Foods*—makes no reference to *American Pipe* tolling or the interplay between statutes of limitations and class actions, which is presumably why respondents did not cite it in their opposition to certiorari.

The second case is *Smith*, but that decision also did not concern equitable tolling, and its one mention of *American Pipe* reaffirms that decision's limitation to individual claims, explaining that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*." 564 U.S. at 313 n.10 (emphasis added).

Finally, the court of appeals relied heavily on *Shady Grove*, which the court believed requires extending *American Pipe* to class actions. That understanding is based on a misreading of both *Shady Grove* and *American Pipe*.

*Shady Grove* had nothing to do with equitable tolling. Rather, it addressed whether a state law limiting the certifiability of certain classes can bind federal courts sitting in diversity. *See Shady Grove*, 559 U.S. at 398 (plurality opinion). The Court held that only Congress, not a state, can create exceptions to the Federal Rules of Civil Procedure. The Court therefore concluded that all individual claims that can be brought in federal court can be aggregated under Rule 23, even if such claims could not be aggregated if brought in state court. *Id.* at 398–406. The Ninth Circuit believed that this principle required extending *American Pipe* to class actions, reasoning that if *American Pipe* tolls the claims of every absent class member, and *Shady Grove* requires the Court to permit aggregation of individual claims, then *American Pipe*'s tolling rule must apply equally to class actions and individual claims. Pet. App. 17a. That reasoning is incorrect in two ways.

First, it rests on the premise that every absent class member is entitled to *American Pipe* tolling. But that is a faulty premise. As explained earlier, *American Pipe* tolls the limitations period for absent class members who act diligently to protect their rights by reasonably relying on the class mechanism and then filing their own claim if the class fails. *See supra* at 26–29. Most obviously, *American Pipe* does not toll the limitations period for absent class members who remain absent even after the class action fails—i.e., absent class members who are not entitled to equity because they have failed to diligently protect their rights. *See supra* at 35. *Shady Grove* simply does not require or even authorize courts to toll statutory time bars in those circumstances.

Indeed, the court of appeals' reasoning is foreclosed by the Rules Enabling Act, 28 U.S.C. § 2072(b), which precludes construing the federal rules of procedure as enlarging preexisting substantive rights and "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove*, 559 U.S. at 408 (plurality opinion). As a matter of logic, if an absent class member does not file her own suit when the class fails, she would not benefit from equitable tolling. Yet under the Ninth Circuit's reasoning, these same absent class members *do* get the benefit of equitable tolling simply because another class action was filed. Construing Rule 23 to render an individual's untimely claim timely cannot be squared with the Rules Enabling Act.

Second, even if *American Pipe* could be construed as applying to every absent class member in the cir-

cumstances presented there, the court of appeals' reasoning is still exactly backwards. Limitations periods apply unless there is some "extraordinary" justification that requires the period to be tolled. In other words, when an individual files a claim outside the limitations period, that claim is time-barred *unless* there is some particularly compelling reason to allow it to go forward. Thus, *Shady Grove* does not help respondents—their claims as well as those of absent class members are all untimely unless there is a compelling basis for tolling.

There is not. For one thing, there is no basis to reward the named plaintiffs' inexplicable delay in seeking to represent a class that has already been adjudicated and rejected—in this case, twice. Moreover, the compelling justification for tolling recognized in *American Pipe* and *Crown, Cork*—allowing absent class members to rely on a pending class action and thereby avoid prophylactic, duplicative litigation inconsistent with Rule 23—does not apply here for the reasons already explained. *See supra* at 37–45. In fact, allowing tolling in these circumstances would benefit only plaintiffs' counsel and lead to significant adverse consequences. *See supra* at 44–47. There is no equity in extending tolling in these circumstances. The Court should thus refuse to expand the *American Pipe* rule to permit plaintiffs to assert otherwise untimely claims for not only themselves but also absent class members.

## II. *AMERICAN PIPE* AT THE VERY LEAST DOES NOT APPLY WHEN THE PROPRIETY OF CLASS TREATMENT HAS BEEN PREVIOUSLY ADJUDICATED.

For the reasons just explained, equitable principles, established precedent, and sound policy all preclude extending *American Pipe* tolling beyond the individual claims of absent class members to new follow-on class actions. But even if such tolling would somehow be appropriate in some circumstances, it is certainly inappropriate when (as here) a court has already adjudicated and rejected the suitability of the claims for class treatment. There is simply no equitable ground to allow for the relitigation of a class's viability once the statute of limitations has run. And because the district court in the *Dean* action held that the proposed class failed on predominance grounds, respondents' class claims must fail.

### A. It Would Be Inequitable to Toll a Limitations Period to Allow Relitigation of Class Certification.

There is no equity in allowing an untimely attempt to relitigate class certification when it has already been denied based on the unsuitability of the claims for class treatment. Two circuits have adopted this approach, permitting tolling where "certification has been denied solely on the basis of the lead plaintiff's deficiencies"—i.e., typicality and adequacy—and rejecting tolling where there has already been an adverse "class-based determination." *Yang*, 392 F.3d at 111; *see also Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007). Even if this Court declines to foreclose equitable toll-

ing for class actions in all circumstances, it should at a minimum adopt the limitation on tolling recognized by the Third and Eighth Circuits.

1. As an initial matter, extending *American Pipe* tolling to subsequent class actions after the initial action failed because of the unsuitability of the class would be inconsistent with a major premise underlying the *American Pipe* rule. As explained, that rule rests on the principle that it is reasonable for a diligent plaintiff seeking to protect her own rights to rely on the pendency of a class action until that action fails. *See supra* at 26–29, 33–34. That may be true before the validity of the class has been litigated. But once a court has determined that a class cannot proceed, relying on subsequent class actions to protect one's rights is no longer reasonable. A diligent plaintiff would, like the plaintiffs in *American Pipe* and *Crown, Cork*, file her own action.

The Ninth Circuit's rule, however, would extend equitable tolling to absent class members who did nothing to assert their rights even when the case was deemed unsuitable for class-wide adjudication. Potential plaintiffs who rely on the class mechanism after it has been rejected have not been diligent and cannot benefit from equitable tolling of the statute of limitations.

2. Even setting aside this insurmountable obstacle, *American Pipe* tolling should not be extended in these circumstances because doing so would be inequitable. It is a fundamental rule of equity jurisprudence that courts of equity will never act when "by granting the relief asked," "injustice would be done." *Abraham v. Ordway*, 158 U.S. 416, 420 (1895). Ex-

tending relief under *American Pipe* to class actions when the validity of class-wide adjudication has already been litigated and rejected would work a substantial injustice. After all, such a rule would allow plaintiffs to repeatedly challenge decisions about the merits of class treatment and "stack[] . . . class action suits indefinitely." *Yang*, 392 F.3d at 112 (internal quotation marks omitted). Defendants would be subjected to the "expense and vexation attending multiple lawsuits," *Montana v. United States*, 440 U.S. 147, 153 (1979), including burdensome class discovery. Precious judicial resources would needlessly be consumed relitigating an issue that has already been determined on the merits with all the protections of Rules 23(a) and (g) and the possibility of rigorous appellate review. And allowing relitigation of such class certification determinations would inevitably undermine confidence in the judicial system, since the very purpose of relitigating the validity of class treatment is to produce an inconsistent decision.

For precisely these reasons, courts of equity have long intervened "to avoid the relitigation of questions once settled." *Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co.*, 198 U.S. 188, 195 (1905) (internal quotation marks omitted). Collateral estoppel, for example, protects against relitigation of issues. It is true that absent class members cannot be precluded from timely relitigating class certification because they were not parties to the original action. *Smith*, 564 U.S. at 313. But that hardly means that equity should be invoked *to overcome an otherwise applicable time bar* merely to permit them to do so. Once a

claim has been found unsuitable for class treatment, there is simply no equity in allowing the same issue to be relitigated beyond the strictures Congress established.

3. Nor is there any compelling justification to extend tolling to allow relitigation of the validity of a class when certification has been denied for a class-based reason. Absent class members' individual claims are already fully protected by *American Pipe*. And when class treatment is rejected because of a failure in the class rather than a failure of the lead plaintiff, absent class members cannot complain that their absence prejudiced the result—particularly when, as here, they had every opportunity and incentive to come forward if they believed they could litigate class certification better than others, *see supra* at 8. The question of whether their claim is suitable for class adjudication has already received "one full and fair opportunity for judicial resolution," *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328 (1971), and there is no plausible equitable principle warranting redetermination of that question after the limitations period has run.

### B. This Class Action Is Untimely Under That Principle.

1. Were the Court to adopt this limiting rule, respondents' class claims would be time-barred. The *Dean* class action was rejected not because of any defect with the *Dean* plaintiffs, but because the class lacked predominance. *See* Fed. R. Civ. P. 23(b)(3).

There is no dispute that this action was "based on the same facts and circumstances, and on behalf of

the same would-be class," as in *Dean*. Pet. App. 8a. Nor is there any dispute that the district court in the *Dean* action denied certification because the *Dean* plaintiffs were "unable to establish that questions of law or fact common to class members predominate over any questions affecting any individual members." JA 192. That should be the end of the matter: Because the would-be class has already had one full and fair opportunity to litigate the merits of class certification, their claims should not be tolled to allow them yet another chance to litigate certification.

2. In the court of appeals, respondents argued that even this modest limitation on relitigation should not apply to their claims. According to respondents, although the *Dean* court denied the certification motion on predominance grounds, the decision really was not a determination on the suitability of the claims for class treatment because it rested on the *Dean* plaintiffs' experts' failure to prove up their fraud-on-the-market theory.

But the equitable principle against relitigation applies so long as there is a class-based determination, even if the court "couche[s] its findings in terms of [plaintiff's] failure to meet her burden." *Yang*, 392 F.3d at 110–11. That rule makes perfect sense. The denial of class certification can always be recharacterized as a failure of proof by the plaintiffs, and no court decides based on evidence not before it whether a class could *ever* be certified. Thus, as the district court rightly recognized, respondents' attempt to skirt its predominance finding by re-characterizing it as a plaintiff-specific failure would "allow for tolling to extend indefinitely as class action plaintiffs re-

peatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence." Pet. App. 36a.

Moreover, there will always be subsequent plaintiffs and attorneys lining up to file another class action on the theory that they could have done a better job litigating class certification. But the district court expressly determined that the *Dean* plaintiffs were adequate class representatives "represented by qualified and competent counsel," with "significant experience in litigating complex class actions, especially in the area of securities fraud." JA 186. Had respondents here believed that they could represent the class better than the *Dean* plaintiffs could, they had notice and every opportunity to seek to be named as lead plaintiffs. *See supra* at 8. They instead did nothing until the statute of limitations had run. The only result consistent with Congress's decision to subject respondents' claims to a 2-year statute of limitations—not to mention with equity—is to dismiss respondents' class claims as time-barred.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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IN THE
# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner,*

v.

MICHAEL H. RESH, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554 (emphasis added).

The question presented is:

Whether plaintiffs whose individual claims are timely as a result of *American Pipe* tolling also may bring those claims in a subsequent class action on behalf of all class members who also had timely claims under the *American Pipe* rule.

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## INTRODUCTION

Petitioner and respondents start from the same premise. Under the class-tolling rule first recognized by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and reaffirmed last Term, "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class.'" *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (quoting *American Pipe*, 414 U.S. at 554). Because of the tolling effect of earlier timely class actions, petitioner never has disputed that the named plaintiffs' claims here were timely, and every class member had a timely claim that it could have asserted individually at the time that respondents filed their class-action complaint.

Petitioner parts with respondents and the court below in asserting that class members' claims (that concededly would have been timely if asserted individually) should be deemed untimely simply because they were asserted as a class action. Petitioner's position contravenes Federal Rule of Civil Procedure 23 and the Rules Enabling Act. Rule 23 "creates a categorical rule" entitling a plaintiff who meets Rule 23's criteria to move for class certification and "*automatically* applies" in all federal civil actions. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398, 400 (2010). Federal courts cannot impose a new requirement that class members not rely on class tolling to prove timeliness, nor can they exclude such cases from class consideration. Moreover, petitioner's position that individual plaintiffs can rebut a limitations defense by showing inclusion in an earlier class action, but class plaintiffs cannot, "ignore[s] the Rules Enabling Act's pellucid instruction that use of the

class device cannot 'abridge ... any substantive right.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (quoting 28 U.S.C. § 2072(b)) (ellipsis in original). A straightforward application of those legal strictures should be sufficient to affirm the Ninth Circuit's judgment.

A long line of this Court's precedents provides additional support. From *American Pipe* itself to *CalPERS v. ANZ* last Term, this Court's cases confirm that a timely class action suspends the statute of limitations for all class members, whether they subsequently assert their claims individually or as a class. The Court has explained the *American Pipe* rule as a means of ensuring that Rule 23 operates as intended – to prevent the need for class members to make duplicative filings that would destroy the "'litigative efficiency and economy'" of class actions. *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 556). That same logic applies in the context of subsequent class actions. Absent tolling, class members would file duplicative class actions to protect the ability to proceed as a class.

Tolling for subsequent class actions, no less than tolling for subsequent individual claims, is "in accord with 'the functional operation of a statute of limitations.'" *Id.* (quoting *American Pipe*, 414 U.S. at 554). Class members included in a timely class action "cannot be accused of sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983). And a timely class action puts defendants on fair notice of potential liability in a subsequent class action asserting similar claims. Thus, even if petitioner were correct that class members had to show diligence and that tolling furthers Rule 23's policies, respondents have done so.

At bottom, petitioner's flawed legal contentions boil down to a policy argument: that, unless this Court recognizes a new limitation on class tolling, rampant "abusive" filing of "stacked" class actions will follow, creating "perpetual tolling" of limitations periods. Pet. Br. 46-48. This Court rejected an identical policy argument in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), concluding that a preclusive bar against subsequent class actions was unnecessary because comity and other tools of judicial administration were sufficient curbs on potential abuse. Since *Smith*, comity has proven to be a workable means for lower courts to decide which subsequent class actions should and should not go forward. Further, in securities class actions such as this one, perpetual tolling is literally impossible, because the statute of repose serves as an absolute cutoff of liability. Unsurprisingly, even though for many years many circuits have permitted class tolling, petitioner cites zero evidence that its parade of horribles has come to pass. The Court should reaffirm, consistent with its repeated holdings, that a timely class action suspends the limitations as to *all* asserted class members, and reject petitioner's invitation to erect a new limitation on class tolling.

## STATEMENT

### A. Statutory And Doctrinal Background

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), as implemented by Securities and Exchange Commission ("SEC") Rule 10b-5, prohibits fraudulent statements and schemes in connection with the purchase or sale of securities. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

"As courts have frequently noted, class action treatment is particularly appropriate when plaintiffs seek redress for violations under the securities laws." *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 91-92 (S.D.N.Y. 2007) (collecting cases). In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court "held that securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014); *see id.* at 2407-13 (rejecting contention that *Basic* should be overruled). The presumption of reliance "facilitates class certification" of securities fraud class actions, because it allows reliance to be proven through classwide proof. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 462-63 (2013).

This presumption applies if the stock trades in an efficient market and the plaintiff purchased stock between the time that a material, public misrepresentation was made and when the truth was revealed. *See Halliburton*, 134 S. Ct. at 2408. Lower courts determining whether a stock trades in an efficient market frequently look to factors discussed in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989): (1) average weekly trading volume; (2) number of securities

analysts that follow the stock; (3) whether the stock had numerous market makers; (4) the company's eligibility to file a registration statement under SEC Form S-3; and (5) the existence of a cause-and-effect relationship between unexpected corporate news and changes in the stock price. *Id.* at 1286-87. Class certification of securities fraud class actions often turns on whether plaintiffs can prove market efficiency, typically through statistical event studies performed by experts. *See Halliburton*, 134 S. Ct. at 2412, 2415.

In *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350 (1991), this Court held that a 1-year limitations period and 3-year repose period applied to Rule 10b-5 claims. *Id.* at 364. The Sarbanes-Oxley Act of 2002 extended the applicable time bars for Rule 10b-5 actions to a 2-year statute of limitations and a 5-year statute of repose. *See* 28 U.S.C. § 1658(b) (securities fraud actions "may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation"). This case concerns the 2-year statute of limitations period of § 1658(b).

**B. Factual And Procedural Background**

1. Petitioner was a holding company whose subsidiaries purportedly manufactured and sold organic compound fertilizers in China. JA47 (¶ 3). Petitioner was incorporated in Delaware with its principal place of business in Beijing, China. JA50 (¶ 19). In 2005, petitioner became listed on the NASDAQ stock exchange through a "reverse merger." JA51 (¶ 21). In a reverse merger, a public shell company acquires a private company, and, in exchange, shareholders of the private company obtain a controlling share of the public company. This device, which foreign companies

frequently employ to achieve listing on an American stock exchange without undergoing the regulatory scrutiny of an initial public offering, enables a private company to acquire the stock listing of the shell company. *Id.*

Respondents allege that petitioner made material false and misleading statements, beginning on November 12, 2009, as part of a wide-ranging scheme that fraudulently misrepresented nearly all of petitioner's reported revenue and earnings. JA46-48 (¶¶ 1, 4).[1] Petitioner's quarterly and annual reports significantly overstated its revenues and net income, JA60-61 (¶¶ 47-53), as shown by the fact that petitioner reported significantly lower revenues and income to Chinese authorities, JA61-70 (¶¶ 54-71). Respondents' pre-suit investigation unearthed further evidence of fraud, including shuttered and dormant factories and shell company suppliers owned by parties affiliated with company insiders. JA70-72, 78-82 (¶¶ 73, 100-104).

A series of corrective disclosures revealed petitioner's fraud. On February 3, 2011, a market research report (the "LM Report") entitled "China Agritech: A Scam" was published. JA85-86 (¶ 111); *see* SJA20-46 (LM Report). This report asserted that petitioner's financial statements were fraudulent and that many of petitioner's factories were idle. JA86 (¶ 112); SJA21-34. Another report on February 15, 2011, presented further evidence of the fraud. JA86-87 (¶ 118); SJA47-51. In March 2011, petitioner announced the formation of a special committee to investigate fraud allegations and further announced that the company's

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[1] At the motion-to-dismiss stage, this Court takes plaintiffs' factual allegations as true. *See, e.g., Walden v. Fiore*, 134 S. Ct. 1115, 1119 n.2 (2014).

auditor had resigned, citing concerns about the accuracy of the company's financial representations. JA87-88 (¶¶ 120-121). Petitioner's stock price dropped significantly following each corrective disclosure; overall, it dropped from $10.78 on February 2, 2011, to $6.88 on March 14, 2011, when NASDAQ delisted petitioner's stock and halted trading. JA86-87, 89 (¶¶ 113, 119, 124). Petitioner's stock price continued to drop in pink sheet trading, to $3.00 on May 23, 2011, and $0.16 on October 16, 2012. JA90 (¶¶ 126-128).[2]

**2.** On February 11, 2011, Theodore Dean and other shareholders ("Dean") filed a class-action complaint; as amended, the complaint asserted claims against petitioner and certain officers, directors, underwriters, and auditors, on behalf of a putative class of all investors who purchased petitioner's stock from November 12, 2009, through March 11, 2011 (the "class period"). *See Dean v. China Agritech, Inc., et al.*, No. 2:11-cv-1331-RGK (C.D. Cal.) ("*Dean* Action"). Dean alleged claims for violations of § 10(b) and § 20(a) of the Exchange Act and Rule 10b-5 against petitioner and other company insiders, and for violations of the Securities Act of 1933 ("Securities Act") against some of petitioner's executives, directors, underwriters, and auditors. JA162-72 (¶¶ 123-168). Dean alleged the same fraudulent conduct that forms the basis of respondents' claims. *Compare* JA60-104 (¶¶ 47-147) (*Resh*) *with* JA133-58 (¶¶ 42-114) (*Dean*); *see also* Pet. Br. 1 (describing class actions as "identical"). It is undisputed that the *Dean* Action was timely,

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[2] On October 17, 2012, the SEC revoked the registration of petitioner's stock for repeated securities law violations (including failure to make required disclosures) and ordered petitioner to cease and desist from committing such violations. SJA52-57.

because it was filed just 8 days after discovery of the violation and less than 5 years after the alleged violations. *See* 28 U.S.C. § 1658(b); Pet. App. 11a.[3]

Pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, two separate investor groups sought appointment as lead plaintiffs. The PSLRA states that, within 90 days of publication of notice of a securities class action, "the court shall consider any motion made by a purported class member . . . and shall appoint" a lead plaintiff deemed the "most adequate plaintiff." *Id.* § 78u-4(a)(3)(B)(i). The district court denied both motions and stated it would not appoint lead plaintiffs until "the time of certification." SJA1-6, 7-11.

On October 27, 2011, the district court (Judge Klausner) granted in part and denied in part petitioner's motions to dismiss. *See* Order Denying Mots. To Dismiss, *Dean* Action, Dkt. 85 (Oct. 27, 2011). The court dismissed the Securities Act claims but held that Dean stated valid Exchange Act claims. *Id.*

On January 6, 2012, Dean moved for class certification under Rule 23(b)(3). *See* Pls.' Mot. for Class Certification, *Dean* Action, Dkts. 94-96 (Jan. 6, 2012). On May 3, 2012, the district court denied the motion. JA177-92. The court first held that Dean satisfied the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a). JA184-86. The court addressed whether Dean had proven market efficiency to invoke the presumption of reliance, considering the factors articulated in *Cammer v. Bloom*, 711 F. Supp.

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[3] For purposes of the limitations period, discovery occurred on February 3, 2011, the date of the LM Report. For purposes of the repose period, the first alleged violation occurred no earlier than November 12, 2009, the start of the class period and the date of the first alleged misrepresentation.

at 1286-87. JA188. The court held that the first, third, and fourth *Cammer* factors supported market efficiency: large trading volume, sufficient market makers, and ability to file a registration statement. JA189-90. But the court concluded that Dean's expert had failed to satisfy the second *Cammer* factor (analyst coverage) because, although he concluded that many analysts covered petitioner's stock, he had not provided enough background information about these analysts. JA190. With respect to the fifth *Cammer* factor – effect of news on stock price – one of Dean's experts submitted an event study showing a statistically significant relationship between company news and stock price movement. JA191. But the court concluded that this expert's findings were inconsistent with findings of Dean's other expert. *Id.* On that basis, the court found "that Plaintiffs are unable to establish that Agritech stock was treated on an efficient market." JA192.

After the Ninth Circuit denied Dean's Rule 23(f) petition for interlocutory review, *see* Order from Ninth Circuit, *Dean* Action, Dkt. 16 (Aug. 8, 2012), Dean settled with petitioner and other defendants on an individual basis, *see* Stipulation for Dismissal with Prej. Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), *Dean* Action, Dkt. 204 (Sept. 18, 2012).

**3.** On October 4, 2012, Kevin Smyth and other shareholders ("Smyth") filed a new complaint in the District of Delaware. *See* Pet. App. 7a. The *Smyth* plaintiffs asserted substantially the same claims under the Exchange Act and Rule 10b-5 (omitting the Securities Act claims dismissed in *Dean*) on behalf of the same class as those alleged in *Dean*, represented by the same counsel. Pursuant to defendants' motion to transfer under 28 U.S.C. § 1404(a), the action was

transferred to the Central District of California, where it was deemed related to *Dean* and assigned to Judge Klausner. *See* Pet. App. 7a; *Smyth v. Yu Chang, et al.*, No. 2:13-cv-3008-RGK (C.D. Cal.) ("*Smyth* Action"). It is undisputed that *Smyth* was timely, because it was filed less than 2 years after discovery (the February 3, 2011 LM Report) and less than 5 years after the earliest alleged violation (November 12, 2009). *See* 28 U.S.C. § 1658(b); Pet. App. 11a.

Pursuant to the PSLRA, three separate investor groups sought appointment as lead plaintiffs. Judge Klausner did not rule on these motions until ruling on plaintiffs' later class-certification motion. JA265.

A group of plaintiffs moved for class certification. JA249. They attached an expert report that sought to remedy the deficiencies identified in the *Dean* class certification motion. *See* Decl. of Howard J. Mulcahey, *Smyth* Action, Dkt. 89-1 (Aug. 5, 2013). The report included extensive discussion of analyst coverage of petitioner's stock and attached seven analyst reports as exhibits. *Id.* ¶¶ 31-48, Exhs. 6-12. With respect to the effect of news on stock price, the expert performed 15 separate statistical analyses to demonstrate market efficiency, including several event studies. *Id.* ¶¶ 65-143. In opposing class certification, petitioner did not argue that the *Smyth* plaintiffs had failed to show that common issues predominated over individual issues, nor did petitioner submit an expert report to rebut plaintiffs' expert; petitioner argued solely that the district court should follow its class-certification denial in *Dean* under principles of comity and that the *Smyth* plaintiffs failed the typicality and adequacy requirements. *See* China Agritech, Inc.'s Opp. to Pls.' Mot. for Class Certification at 9-20, *Smyth*

Action, Dkt. 93 (Aug. 13, 2013) ("China Agritech Class Cert. Opp., *Smyth* Action, Dkt. 93").

On September 26, 2013, the district court denied the class-certification motion. JA248-49. The court determined that the *Smyth* class representatives failed the typicality requirement because their alleged shared control of the *Dean* Action subjected them to unique claim preclusion defenses. JA255-60. The court also determined that the *Smyth* plaintiffs were inadequate class representatives because they had not demonstrated sufficient engagement with the litigation. JA260-62.

The district court considered and rejected petitioner's alternative argument that it should deny class certification on the basis of the *Dean* class-certification denial and "principles of comity." JA264. The court reasoned:

> Even if this action is materially identical to *Dean*, it is not clear that the reason the Court denied class certification in *Dean* applies equally to this case. In *Dean* the Court held that Plaintiffs had failed to establish that questions of law or fact common to the class predominated over individual questions, as required under Rule 23(b)(3). That holding was based on a finding that one of the Plaintiffs' own experts had failed to demonstrate market efficiency. Plaintiffs in this action have submitted entirely new expert declarations. Given the different factual showings in each case, it would be improper to decide class certification issues based solely on comity.

*Id.*

Following the court's ruling, the *Smyth* plaintiffs settled with petitioner on an individual basis.

4. On June 30, 2014, respondents (represented by different counsel than counsel in *Dean* and *Smyth*) filed a class action in the instant case in the Central District of California against petitioner and several individual defendants (the *Resh* Action). Plaintiffs asserted Exchange Act and Rule 10b-5 claims premised on the same false statements alleged in *Dean* and *Smyth*. The *Resh* Action was transferred to Judge Klausner after respondents identified it as related to *Dean* and *Smyth*.

It is undisputed that the *Resh* Action was filed within the statute of repose, because it was filed within 5 years of the first alleged violation on November 12, 2009. *See* 28 U.S.C. § 1658(b)(2). It also is undisputed that the *Resh* Action was filed within the 2-year statute of limitations if that statute was tolled during the pendency of the *Dean* Action and the *Smyth* Action until the respective denials of class certification in each action under the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); and that, without the benefit of tolling from both actions, the *Resh* Action would be untimely under the statute of limitations. Pet. App. 11a-12a.

Respondents moved for appointment as lead plaintiffs within the time period set by the PSLRA. *See Resh* Action, Dkts. 22, 23 (Sept. 3, 2014). As in *Dean* and *Smyth*, the district court declined to appoint a lead plaintiff until "the time of certification." SJA63.

Petitioner subsequently moved to dismiss the *Resh* Action in its entirety as time-barred or, in the alternative, to strike the class allegations. The district court dismissed the action as untimely on the basis of its status as a class action. Pet. App. 36a. The court believed that it was constrained by Ninth Circuit precedent, *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), to hold that a class action could never toll

the statute of limitations for a subsequent class action following denial of class certification. Pet. App. 31a-35a.

The district court subsequently concluded that the named plaintiffs "[we]re not prevented from filing a complaint asserting individual, rather than class action, claims . . . if they so choose." SJA65. The court denied respondents' motion for reconsideration of its dismissal order. Pet. App. 38a-44a.

**5.** The Ninth Circuit reversed the district court's order dismissing the *Resh* Action as untimely. The court began by noting that, under *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 34 (1983), "it is clear that the individual claims of the would-be class members in the *Resh* Action have been tolled during the pendency of earlier class actions." Pet. App. 14a.

The Ninth Circuit concluded that "[t]hree recent Supreme Court decisions have confirmed [its] view" that respondents could assert the tolled claims on behalf of the class under Rule 23. *Id.* at 17a. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), this Court "rejected an argument . . . that only certain categories of claims are eligible for class treatment under Rule 23." Pet. App. 17a. Under *Shady Grove*, Rule 23 cannot "'be set aside when a suit's timeliness depends on a tolling rule.'" *Id.* at 18a (quoting *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011) (Easterbrook, C.J.)).

The Ninth Circuit next found support in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), in which this Court rejected an argument that class-certification denials must preclude subsequent class actions to avoid "'serial relitigation of class certification.'" Pet. App. 19a (quoting *Smith*, 564 U.S. at 316).

Finally, the Ninth Circuit cited this Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which concluded that it would violate the Rules Enabling Act to hold that representative proof that was admissible to prove individual claims could not be used to prove class claims. Pet. App. 20a. *Tyson Foods* "reinforce[d] [the court's] conclusion that the statute of limitations does not bar a class action brought by plaintiffs whose individual actions are not barred." *Id.* at 21a.

The Ninth Circuit concluded that "permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place." *Id.*

Moreover, the Ninth Circuit concluded that "the current legal system is adequate to respond to" a concern about "abusive filing of repetitive class actions." *Id.* at 22a. Where a previous class-certification denial makes it "clear that a proposed class is not viable under Rule 23, . . . potential future plaintiffs (or, more precisely, their attorneys) will have little to gain from repeatedly filing new suits." *Id.* Further, "ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class certification." *Id.*

Petitioner's petitions for panel rehearing and rehearing *en banc* were denied without dissent. Pet. App. 46a.

## SUMMARY OF ARGUMENT

**I.A.** It is undisputed that every class member had a timely individual claim. Petitioner acknowledges that, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), a timely class action suspends the limitations period, at least as to subsequent individual claims by class members. Even under petitioner's view of *American Pipe*, any of the class members could have brought a timely individual claim at the time the *Resh* class action was filed.

**B.** The question in this case is whether class members with timely individual claims may maintain them as a class action. The answer is yes, so long as they satisfy the requirements of Rule 23. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action" and "*automatically* applies" in all civil actions. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-400 (2010). Petitioner impermissibly attempts to add a requirement to Rule 23 that class members may not rely on class tolling to demonstrate timeliness.

**C.** To hold that the class members' timely individual claims were untimely because they were asserted as a class action would violate the Rules Enabling Act. Under that Act, evidence "relevant in proving a plaintiff's individual claim . . . cannot be deemed improper merely because the claim is brought on behalf of a class." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016). Petitioner's position that valid proof of timeliness of an individual claim (inclusion in an earlier class action) becomes invalid to prove timeliness of an identical class claim "ignore[s] the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive

right.'" *Id.* (quoting 28 U.S.C. § 2072(b)) (ellipsis in original).

**II.A.** Class tolling is a doctrine rooted in "the traditional equitable powers of the judiciary" that this Court crafted to "further[] 'the purposes of litigative efficiency and economy' served by Rule 23." *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051, 2052 (2017) (quoting *American Pipe*, 414 U.S. at 556). This Court recognized that tolling was necessary for Rule 23 class actions to function as intended. Without tolling, class members would be induced to make duplicative filings to protect their rights, destroying the judicial efficiency that class actions were meant to foster.

The Court also recognized that class tolling "was in accord with 'the functional operation of a statute of limitations.'" *Id.* at 2051 (quoting *American Pipe*, 414 U.S. at 554). Putative class members who benefit from tolling "cannot be accused of sleeping on their rights" because they are entitled to rely on the class action to protect those rights. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983). Class tolling is fair to defendants because the timely class action notifies them of the claims against them. *See ANZ*, 137 S. Ct. at 2051.

**B.** This Court consistently has held that a timely class action "suspends the applicable statute of limitations as to *all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554 (emphasis added). *Crown, Cork* clarified that *American Pipe* did not create a limited rule applicable only to a specific procedural context, but instead recognized a broadly applicable tolling rule that benefited all class members.

This Court has applied class tolling in a variety of procedural contexts, never limiting the scope of its tolling of limitations periods. The Court consistently has noted that class tolling benefits all asserted members of the class. Accordingly, respondents seek a faithful application of this Court's class-tolling precedents, not an extension of them, as petitioner erroneously contends.

**C.** The Court's rationales for class tolling apply fully when tolling is applied to a subsequent class action. Class tolling is intended to prevent the need for class members to make duplicative filings to protect their rights. The same deleterious effect would occur if class tolling did not apply to subsequent class actions, because class members would have the incentive to file duplicative, protective class actions.

The *American Pipe* Court concluded that class tolling was consistent with the policies underlying statutes of limitations. The same is true when class tolling is applied to subsequent class actions. Statutes of limitations are designed to "bar[] a plaintiff who 'has slept on his rights,'" *American Pipe*, 414 U.S. at 554 (quoting *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)), but "th[is] end[] [is] met when a class action is commenced," *Crown, Cork*, 462 U.S. at 352-53. Any burden of diligence is satisfied by the filing of the original class action. Even if a class member were required to demonstrate further diligence after class treatment were denied in the first action, the filing of the subsequent class action on the class member's behalf would satisfy that burden.

Moreover, as in *American Pipe*, a timely class action gives defendants fair notice of the claims in a subsequent class action, as defendants can hardly claim

unfair surprise when faced with a class action asserting identical claims as an earlier, timely class action.

**III.A.** Petitioner mistakenly contends that the Court must impose a new equitable limitation on *American Pipe* because the application of class tolling to subsequent class actions purportedly does not satisfy requirements of plaintiff diligence and extraordinary circumstances justifying tolling. Petitioner's equitable arguments cannot overcome the force of Rule 23 and the Rules Enabling Act, which dictate that valid individual claims cannot be deemed invalid simply because they are asserted as a class action.

Moreover, because class tolling is motivated by judicial efficiency, rather than fairness to plaintiffs, the requirements of diligence or extraordinary circumstances do not apply in the same manner as in other equitable tolling cases. *See ANZ*, 137 S. Ct. at 2051. To the extent these requirements do apply, they are satisfied here. The filing of the original class action (and certainly the filing of the subsequent class action) on the class member's behalf satisfies any burden of diligence. Petitioner concedes that furtherance of the policies of Rule 23 is an "extraordinary circumstance" justifying tolling. Class tolling furthers Rule 23's policies just as much when applied to class actions as it does when applied to individual actions.

**B.** Petitioner's policy concerns about "abusive," "stacked" class actions "perpetual[ly]" extending the statute of limitations, Pet. Br. 46-48, are largely invented. This Court already considered and dismissed petitioner's policy argument in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), when it held that comity and other tools of judicial administration were sufficient to address policy concerns regarding relitigation of class-certification denials. Since *Smith*, lower courts

have shown that they can apply comity to deny class treatment early in a case, without discovery, where appropriate. But comity does not preclude certification of a subsequent class action "when the basis for the earlier denial . . . is no longer present in a subsequent proceeding." Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 2.11 cmt. c (2010). That is the case here, where the class-certification denial in *Dean* hinged on a specific failure of proof in the plaintiffs' expert report, which was remedied in the subsequent actions, and the denial in *Smyth* was based on specific concerns about adequacy of representation limited to the proposed representatives in that case.

In securities class actions and other lawsuits subject to a statute of repose, the statute of repose serves as an outer limit to liability. *See ANZ*, 137 S. Ct. at 2051. Thus, perpetual tolling is impossible.

Given the mechanisms available to limit relitigation of class certification, it is unsurprising that petitioner advances no evidence of "abusive," "stacked" class actions in circuits that have applied class tolling to subsequent class actions for years. This lack of evidence shows that petitioner's concerns "likely are overstated." *Id.* at 2054.

**IV.** Petitioner's position would lead to inequitable outcomes in many cases. Denying tolling when class certification is denied because of a plaintiff-specific reason serves no equitable purpose. Moreover, even where certification is denied for a class-based reason, a subsequent class action that incorporates the court's guidance to cure the identified deficiency should be allowed to proceed. Comity, rather than a new limitation on class tolling, provides the appropriate mechanism for district courts to determine which subsequent class actions should go forward.

## ARGUMENT

### I. UNDER RULE 23, CLASS MEMBERS ARE ENTITLED TO BRING THEIR TIMELY INDIVIDUAL CLAIMS AS A CLASS ACTION

#### A. As Petitioner Concedes, Each Class Member Had A Timely Individual Claim Under *American Pipe* And *Crown, Cork*

Under the *American Pipe* rule, every member of the *Resh* class action had a timely individual claim that it could have filed at the time of the *Resh* class complaint. This Court held in *American Pipe* that a timely class-action lawsuit "tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 553. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court clarified that "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." *Id.* at 350 (quoting *American Pipe*, 414 U.S. at 554). Thus, a class member who files a separate individual lawsuit is entitled to the benefit of tolling. *See id.* at 353-54.

Petitioner does not argue that *American Pipe* or *Crown, Cork* should be overruled, at least insofar as they apply to individual claims. To the contrary, petitioner argues at length that these decisions correctly held that a class action tolls the limitations period for subsequent individual claims. *See* Pet. Br. 26-28, 30-31, 33-34, 37-38.

Thus, even under petitioner's view of the law, each class member here had a timely claim. The *Dean* and *Smyth* class actions were undisputedly timely, *see supra* pp. 7-8, 10, and therefore "stop[ped] the limitations clock." *Artis v. District of Columbia*, 138 S. Ct.

594, 602 (2018). Accounting for this suspension, the limitations clock had been running for just 439 days at the time of the *Resh* complaint, well under two years. *See* Appellant C.A. Br. Ex. A. It thus is undisputed that, had any class member filed a lawsuit on the date of the *Resh* complaint, it would have been timely. *See* SJA65 ("Plaintiffs are not prevented from filing a complaint asserting individual . . . claims . . . if they so choose."); Pet. App. 11a-12a (because it is "undisputed that . . . the statute of limitations for the individual claims of would-be class members in the *Dean* and *Smyth* Actions was tolled during the pendency of both of those actions, . . . there is no time bar to individual claims brought by plaintiffs who were unnamed class members in the *Dean* and *Smyth* Actions").

### B. Because These Class Members Have Timely Individual Claims, They May Maintain Them As A Class Action If They Satisfy The Requirements Of Rule 23

The question in this case is whether the class members, each of whom had timely individual claims, may maintain them as a class action. As this Court recently held, "Rule 23 provides an answer" to this question: "It states that '[a] class action may be maintained' if" the requirements of Rule 23(a) and (b) are satisfied. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (quoting Fed. R. Civ. P. 23(b)) (alteration in original). As noted in *Shady Grove*, "[t]he Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements." *Id.* at 398-99 (citing Fed. R. Civ. P. 8(d)(2)-(3), 14(a)(1), 18(a)-(b), 20(a)(1)-(2), 27(a)(1), 30(a)(1); 29 U.S.C. § 626(c)(1); 42 U.S.C. § 2000e-5(f)(1)). Because "[c]ourts do not maintain actions; litigants do," Rule 23's statement

that a class action "may be maintained" confers discretion on "the plaintiff: He may bring his claim in a class action if he wishes," in "each and every case where the Rule's criteria are met." *Id.* at 399-400. Rule 23 thus "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id.* at 398-99.

In *Shady Grove*, this Court rejected the defendant's contention that class certification should be unavailable when barred by a state statute. *Id.* at 405-06. "[L]ike the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies 'in all civil actions and proceedings in the United States district courts.'" *Id.* at 400 (quoting Fed. R. Civ. P. 1).

Under Rule 23, as interpreted by *Shady Grove*, plaintiffs with viable individual claims are automatically entitled to maintain them as a class action if they meet the Rule 23(a) and Rule 23(b) requirements. Federal courts cannot cite "some *other* law" to create additional obstacles to class treatment. *Id.* at 399. But that is exactly what petitioner proposes to do. According to petitioner, class treatment is unavailable based on a requirement found nowhere in Rule 23: that class members not rely on class tolling for the timeliness of their claims. *See* Pet. App. 17a ("*Shady Grove* directs us, for purposes of class certification, to look only to the criteria of Rule 23 and not to 'some other law.' There is nothing in the certification criteria of Rule 23 that tells us to look to whether the statute of limitation has, or has not, been tolled."). This view that "Rule 23 must be set aside when a suit's timeliness depends on a tolling rule . . . cannot be reconciled with [*Shady Grove*], which holds that Rule 23 applies to all federal civil suits, even if that prevents achieving some other objective that a court

thinks valuable." *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011) (Easterbrook, C.J.).

Petitioner's attempts to avoid the force of *Shady Grove* are unpersuasive. Petitioner disputes (at 52) the premise "that every absent class member is entitled to *American Pipe* tolling," asserting that *American Pipe* protects only those who file individual claims. This contention is incorrect and irrelevant. Class tolling benefits "'all asserted members of the class,'" *Crown, Cork*, 462 U.S. at 350 (quoting *American Pipe*, 414 U.S. at 554), not just some, as petitioner argues. *See infra* Part II. Moreover, petitioner concedes that the class members' claims *would be timely if asserted individually*. *See* Pet. Br. 52; China Agritech, Inc.'s Reply in Support of Mot. To Dismiss the *Resh* Pls.' Putative Class Action or, in the Alternative, Class Allegations as Barred by Statute of Limitations at 9, *Resh* Action, Dkt. 40 (Oct. 20, 2014) (petitioner "does not oppose" class members bringing individual claims). Petitioner's argument that timely individual claims may not be maintained as a class action even if Rule 23 is satisfied contradicts Rule 23 and *Shady Grove*.

### C. The Rules Enabling Act Mandates That Timely Individual Claims Cannot Be Deemed Untimely Because They Are Asserted As A Class Action

Petitioner argues (at 52-53) that, in crafting tolling rules to determine the validity of limitations defenses, courts are free to differentiate between class actions and individual actions, holding that the same defense that is invalid as to an individual claim is valid as to an identical class claim. However, such a holding would violate the Rules Enabling Act, which requires

that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As the Court recognized in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the Rules Enabling Act dictates that the validity of a claim or defense cannot turn on whether a claim is asserted individually or as a class action.

In *Tyson Foods*, employees brought a class action, claiming that the employer had denied all employees at a plant required overtime compensation for time spent donning and doffing protective equipment. *Id.* at 1042. Because the employer had not kept individual records for each employee, the class offered representative proof of damages, in the form of a statistical study of employees' donning and doffing time. *Id.* at 1043-44. Under longstanding Supreme Court precedent, representative proof was an acceptable method for an individual employee to prove damages when the employer had violated its statutory duty to keep records. *See id.* at 1047 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). The employer nonetheless argued that "representative evidence" could not be used to prove damages in a class action. *Id.* at 1046.

This Court rejected the employer's argument as contrary to the Rules Enabling Act. Validity of proof of a claim or defense "turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* Where evidence "is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." *Id.*; *see also Shady Grove*, 559 U.S. at 408 (plurality) ("A class action, no less than

traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.").

Petitioner's position here similarly violates the Rules Enabling Act. As petitioner acknowledges, if the *Resh* class members had pursued their claims under Rule 3 (individual complaint), Rule 20 (joinder with named *Resh* plaintiffs), or Rule 24 (intervention), they would be able to overcome petitioner's limitations defense with proof that they were asserted class members in the timely *Dean* and *Smyth* actions.[4] Yet petitioner contends that this same proof should be deemed invalid in rebutting a limitations defense for identical claims asserted under Rule 23. This position "ignore[s] the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Tyson Foods*, 136 S. Ct. at 1046 (quoting 28 U.S.C. § 2072(b)) (ellipsis in original). Accordingly, petitioner's argument (at 52) that the Rules Enabling Act *requires* differentiating between individual claims and class claims when assessing timeliness must be rejected.

Moreover, in *American Pipe*, this Court held that class tolling did not violate the Rules Enabling Act because it was "consonant with the legislative scheme." 414 U.S. at 558. Petitioner is thus mistaken

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[4] *See, e.g.*, Mem. in Support of China Agritech, Inc.'s Mot. To Dismiss the *Resh* Pls.' Putative Class Action or, in the Alternative, Class Allegations as Barred by Statute of Limitations at 9, *Resh* Action at 20, Dkt. 28-1 (Sept. 22, 2014) (stating that petitioner "welcomes the opportunity to defend itself" against individual claims brought by class members).

(at 52) that applying class tolling to subsequent class actions would violate that Act because class members would benefit from tolling "simply because another class action was filed."

*American Pipe* also rejected petitioner's argument (at 45-46) that tolling is inconsistent with the separation of powers. The Court concluded that prior cases in which it had tolled limitations periods "fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." 414 U.S. at 559. Petitioner cites no authority for the proposition that the separation of powers allows for tolling of subsequent individual actions, but not for subsequent class actions. *American Pipe*'s separation-of-powers analysis also is consistent with more recent cases explaining that Congress legislates against the backdrop of a "presumption" that its statutes are subject to equitable tolling. *See, e.g., United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630-31 (2015).

## II. UNDER THIS COURT'S PRECEDENTS, TOLLING APPLIES FOR ALL PUTATIVE CLASS MEMBERS

This Court's precedents confirm and implement the principles of Rule 23 and the Rules Enabling Act requiring class tolling. In *American Pipe* and other cases, this Court crafted a tolling doctrine, in the exercise of its equitable powers, to ensure that Rule 23 achieved the judicial economy of representative litigation intended by its framers. The rationales behind this Court's class-tolling precedents do not depend on the procedural form of the subsequent action and

apply fully to subsequent class actions. This Court therefore consistently has held that a class action tolls the statute of limitations as to *all* asserted members of the class, not just some members, as petitioner contends.

### A. Class Tolling Is A Doctrine, Rooted In This Court's Equitable Powers, To Facilitate The Judicial Economy Of Rule 23 Class Actions

In *American Pipe*, this Court held that "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class.'" *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (quoting *American Pipe*, 414 U.S. at 554). In the exercise of "the traditional equitable powers of the judiciary," this Court crafted a class-tolling rule in order to "further[] 'the purposes of litigative efficiency and economy' served by Rule 23." *Id.* at 2051, 2052 (quoting *American Pipe*, 414 U.S. at 556). The Court recognized that class tolling was necessary for a Rule 23 class action to operate as intended, as "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe*, 414 U.S. at 550. "Without the tolling, '[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable,' which would 'breed needless duplication of motions.'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 553-54); *see also Crown, Cork*, 462 U.S. at 349 (class tolling designed "[t]o protect the policies behind the class-action procedure").

The Court also concluded that "tolling was in accord with 'the functional operation of a statute of limitations.'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 554). From the plaintiff's perspective, limitations periods further the "polic[y] . . . of barring a plaintiff who 'has slept on his rights.'" *American Pipe*, 414 U.S. at 554 (quoting *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)). But that policy is "satisfied" when a class representative "commences a suit" within the limitations period. *Id.* at 554-55. *Crown, Cork* reaffirmed that "[l]imitations periods are intended . . . to prevent plaintiffs from sleeping on their rights, but th[is] end[] [is] met *when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights.*" 462 U.S. at 352-53 (emphasis added; citations omitted).

Tolling also is fair to defendants and consistent with a statute of limitations' purpose of ensuring that defendants have fair notice of claims. "By filing a class complaint within the statutory period, the named plaintiff 'notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 555) (alteration in original).

In sum, class tolling is an equitable rule designed to further the judiciary's institutional interest in "'litigative efficiency and economy,'" "consistent . . . 'with the proper function of the limitations statute'" to ensure that defendants have timely notice of the claims against them. *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 555-56).

### B. This Court Repeatedly Has Held That A Timely Class Action Suspends The Statute Of Limitations For All Asserted Members Of The Class

From *American Pipe* to last Term's *ANZ* decision, this Court consistently has held that a class action suspends the statute of limitations period for *all* class members, not just some, as petitioner erroneously contends. In *American Pipe*, this Court held that "the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554 (emphasis added).

In *Crown, Cork*, this Court clarified that *American Pipe* did not create a limited rule applicable only to the procedural context of that case (motions to intervene), but instead recognized a broadly applicable tolling principle. The plaintiff in *Crown, Cork* was a class member in an employment discrimination class action who brought a separate individual lawsuit after class certification was denied. 462 U.S. at 347-48. In holding that the plaintiff was entitled to tolling, the Court rejected the defendant's attempt to limit class tolling to the specific procedural context of intervention. "While *American Pipe* concerned only intervenors, . . . the holding of that case is not to be read so narrowly." *Id.* at 350. Rather, "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." *Id.* (quoting *American Pipe*, 414 U.S. at 554).

Petitioner twists *Crown, Cork*'s holding beyond recognition in asserting that, when the Court said "all asserted class members, not just intervenors," it meant "intervenors and individual filers, but no one

else." *See* Pet. Br. 27-28. Rather, this Court has applied class tolling in a wide variety of procedural circumstances: moving to intervene in a former class action following denial of class certification, *American Pipe*, 414 U.S. at 561; filing an individual action after opting out, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974); intervening to appeal denial of class certification after a final judgment, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 391 (1977); filing a separate lawsuit, *Crown, Cork*, 462 U.S. at 354; and applying class tolling to a situation in which state law provided the limitations period that was tolled, *Chardon v. Fumero Soto*, 462 U.S. 650, 654 (1983). The Court never has limited *American Pipe* to specific procedural forms or held that any forms of subsequent action are excluded.

Furthermore, the Court often has repeated, as recently as last Term, the conclusion that a timely class action tolls the limitations period for *all* asserted class members, without limitation. *See ANZ*, 137 S. Ct. at 2051 (*American Pipe* "held the individual plaintiffs' motions to intervene were timely because 'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class'") (quoting *American Pipe*, 414 U.S. at 554). That statement rested on a wealth of precedent. *See Eisen*, 417 U.S. at 176 n.13 (*American Pipe* "established that commencement of a class action tolls the applicable statute of limitations as to all members of the class"); *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) ("Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them."); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 226 n.6 (2012) ("In *American Pipe*, we held that

'commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'") (quoting *American Pipe*, 414 U.S. at 554); *see also Chardon*, 462 U.S. at 665 (Rehnquist, J., dissenting) (*American Pipe* established "a general federal tolling rule grounded on Rule 23" that applies to "'all asserted members of the class who would have been parties had the suit been permitted to continue as a class action'") (quoting *American Pipe*, 414 U.S. at 554).[5]

Indeed, *Devlin*'s holding that unnamed class members may object to and appeal the approval of a class settlement rested in part on the *American Pipe* rule, which this Court cited as authority for the proposition that, even though unnamed class members are not full parties, they retain some rights associated with parties. *See Devlin*, 536 U.S. at 9-11. Both of these rights – tolling and the ability to object and appeal – protect class members from being prejudiced by the outcome of a class action, and both rights are possessed by all class members.

Not once has the Court repudiated its repeated holding that a timely class action suspends the statute

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[5] Petitioner notes (at 29-30) that this Court occasionally has described the specific results of *American Pipe* and *Crown, Cork* as allowing individual intervention motions or lawsuits to proceed. But the Court never has suggested, let alone held, that class tolling is limited to such circumstances. Petitioner's selective quotations omit vital context. For example, while *ANZ* stated that *American Pipe* allowed "ensuing individual actions to proceed," 137 S. Ct. at 2054-55, it explained that "the individual plaintiffs' motions to intervene were timely because 'the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class*,'" *id.* at 2051 (quoting *American Pipe*, 414 U.S. at 554) (emphasis added).

of limitations for all asserted class members, nor has the Court ever held that a timely class action suspends the statute of limitations only for some asserted class members. Accordingly, respondents ask for no more than a faithful application of this Court's class-tolling precedents. In falsely contending (at 4) that respondents seek an "extension of *American Pipe*," petitioner masks its own gambit to seek a new judicially imposed, atextual limitation on Rule 23 to preclude class tolling of a limitations period for all asserted class members.

### C. The Rationales Justifying Class Tolling Apply Fully To Subsequent Class Actions

Beyond the Court's consistent characterization of class tolling as a doctrine that benefits all class members, the equitable principles underlying this Court's class-tolling cases demonstrate that class tolling applies to subsequent class actions. As the Ninth Circuit recognized, "permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place." Pet. App. 21a.

1. The foundational rationale of class tolling is that a Rule 23 class action operate as intended, as a device to achieve "efficiency and economy of litigation." *American Pipe*, 414 U.S. at 553. In *Crown, Cork*, the Court recognized that the same potential harm that *American Pipe* sought to prevent – duplicative filings – would occur if the Court restricted the procedural form of class members' subsequent actions. If class tolling were limited by procedural form and a putative class member believed that the available procedural forms were suboptimal, "[a] putative class

member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." 462 U.S. at 350-51.

The same deleterious effect would result from a judge-made rule excluding subsequent class actions from *American Pipe*. As petitioner acknowledges, its proposed rule encourages the filing of duplicative class actions, because class members concerned that the existing class representative will be unsuccessful in achieving class certification will have the incentive to file a protective class action before the limitations period expires. *See* Pet. Br. 35-36 (arguing that filing a duplicative class action during the limitations period is required for a class representative to demonstrate diligence). Applying class tolling to subsequent class actions "promotes economy of litigation by reducing incentives for filing duplicative, protective class actions." Pet. App. 21a.[6]

Petitioner nonetheless asserts (at 39-40) that its rule will not increase the number of duplicative filings because, even with class tolling, some class members will file duplicative class actions anyway because they

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[6] *See also* Rhonda Wasserman, *Tolling: The* American Pipe *Tolling Rule and Successive Class Actions*, 58 Fla. L. Rev. 803, 854 (2006) (limiting class tolling to individual claims "would invite the very precautionary filing of either individual lawsuits or dueling class actions during the pendency of the original class action that *American Pipe* and *Crown, Cork* sought to discourage"); Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev. 339, 363 (2016) (prohibiting tolling for subsequent class actions "would likely encourage rather than discourage multiplicitous litigation").

"desire[] to represent a class." Petitioner's rule, however, would surely increase the number of duplicative class actions filed by those class members whose concern is not that they serve as class representative, but that class members are represented. *See Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-53 (6th Cir. 2015) ("If each unnamed member of a class that is not certified were barred from ever again proceeding by class action, each class member would have an incentive to multiply litigation by filing protective suits or motions to intervene at the outset of the initial class action suit. The weight of individual filings would strain the federal courts."), *cert. denied*, 136 S. Ct. 1163 (2016).

Applying class tolling to subsequent class actions also fosters judicial economy with respect to the subsequent actions following the denial of class treatment. If the Court adopts petitioner's rule, then after a class action fails to achieve class treatment, defendants will face a multitude of individual actions – for example, individual actions by any China Agritech shareholder with sufficient shareholdings to justify an individual action. But, if the requirements of Rule 23(b)(3) are satisfied, including "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3), then the policies of Rule 23 favor allowing a class action to go forward. *See* Wasserman, 58 Fla. L. Rev. at 853 ("A successive positive-value class action brought on behalf of the entire class would expend fewer judicial resources than 999 individual lawsuits and would be far more efficient than a lawsuit with 999 individual intervenors. Thus, a decision declining to toll the statute of limitations in the context of the successive class action would appear to frustrate this Rule 23 policy [of efficiency and judicial economy].").

2. This Court's conclusion that class tolling "is in no way inconsistent with the functional operation of a statute of limitations," *American Pipe*, 414 U.S. at 554, also applies fully to subsequent class actions. "Limitations periods are intended . . . to prevent plaintiffs from sleeping on their rights, but th[is] end[] [is] met *when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights.* Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork*, 462 U.S. at 352-53 (emphasis added; citations omitted); *accord American Pipe*, 414 U.S. at 554-55.

Petitioner repeatedly quotes that passage from *Crown, Cork* (at 28, 29, 34), but misses its point. Petitioner claims the passage (at 34) as supposed support for the proposition that "the only way formerly absent class members can continue to satisfy the diligence requirement is by filing suit to enforce their own rights." But the Court actually stated that the goal of preventing plaintiffs from sleeping on their rights is "met when a class action is commenced." 462 U.S. at 352.

In other words, class members in a timely class action do not need to take any further action to show that they have not slept on their rights because that is shown by *the timely class action itself.* Therefore, to the extent *American Pipe* is read to impose any burden of diligence to qualify for tolling, that burden is satisfied by the filing of the initial class action and does not depend on whether the subsequent action is an individual action, a mass action, or a class action.

Even if (contrary to this Court's statements in *American Pipe* and *Crown, Cork*) putative class members were required to demonstrate further diligence

after the denial of class treatment to benefit from class tolling, the filing of a subsequent class action would fulfill that requirement. Because "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims," *Crown, Cork*, 462 U.S. at 352-53, the named plaintiff and absent class members in the subsequent class action stand on equal footing when it comes to diligence. Just as class members are entitled to rely on the initial class action, they are entitled to rely on the subsequent class action.

**3.** This Court has explained that class tolling also satisfies the purpose of statutes of limitations from the defendants' perspective. Statutes of limitations are "'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *American Pipe*, 414 U.S. at 554 (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). This "polic[y] of ensuring essential fairness to defendants ... [is] satisfied" when a timely class-action complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.* at 554-55; *accord ANZ*, 137 S. Ct. at 2051.

For the same reason, a timely class action provides defendants with fair notice of a subsequent class action asserting the same claims.[7] "[D]efendants cannot claim surprise or lack of notice" from "a substantively

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[7] If anything, an initial class action provides even clearer notice of a subsequent class action than a series of subsequent individual actions.

identical successive class action." Wasserman, 58 Fla. L. Rev. at 850. In considering whether notice is fair, what matters is not the procedural form of the subsequent action, but whether it "concern[s] the same evidence, memories, and witnesses as the subject matter of the original class suit." *American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring). Because petitioner concedes (at 1) that this class action is "identical" to the timely filed class actions, petitioner cannot credibly claim lack of notice or unfair surprise. "Tolling the statute of limitations thus creates no potential for unfair surprise, *regardless of the method class members choose to enforce their rights upon denial of class certification.*" *Crown, Cork*, 462 U.S. at 353 (emphasis added).[8]

## III. PETITIONER'S ARGUMENTS FOR LIMITING CLASS TOLLING ARE UNPERSUASIVE

### A. Petitioner Fails To Justify A Judge-Made Equitable Limitation On Class Tolling

Petitioner argues (at 30) that this Court must impose an equitable limitation on *American Pipe* because application of class tolling to subsequent class actions fails purported requirements of "plaintiff diligence and extraordinary circumstances justifying tolling." Petitioner is incorrect on many counts.

1. Petitioner's equitable arguments cannot overcome the force of Rule 23, which "*automatically* applies" to all civil actions and "creates a categorical

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[8] Petitioner contends (at 42) that the absence of unfair surprise is not an independent basis for tolling. But as respondents have shown, tolling is justified not just by the absence of unfair surprise but by *all* of the rationales for tolling invoked by this Court in *American Pipe* and other class-tolling precedents. *See supra* Part II.C.

rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 559 U.S. at 398, 400. *See supra* Part I.B. Nor can these equitable arguments overcome the "pellucid instruction" of the Rules Enabling Act, which dictates that, "where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." *Tyson Foods*, 136 S. Ct. at 1046. *See supra* Part I.C.

**2.** In its class-tolling cases, this Court has not applied "in any direct manner" the criteria considered in other equitable tolling cases: "whether the plaintiffs pursued their rights with special care" and "whether some extraordinary circumstance prevented them from intervening earlier." *ANZ*, 137 S. Ct. at 2052. That is because many other equitable tolling cases are motivated by fairness to plaintiffs, *see, e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946), but the foundational rationale of class tolling is "'litigative efficiency and economy,'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 556). To the extent considerations of diligence and extraordinary circumstances are relevant to class tolling, the application of class tolling to subsequent class actions satisfies these requirements.

*First*, as explained above, to the extent a burden of diligence exists with respect to class tolling, the timely filing of the original class action (and certainly the filing of the subsequent class action) satisfies that burden as to all class members because "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork*, 462 U.S. at 352-53. *See supra* Part II.C.2.

No authority supports petitioner's argument (at 34-36) that a plaintiff must file an individual claim to demonstrate diligence. "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citation omitted). It is unreasonable to require a class member in a subsequent class action to take the belt-and-suspenders approach of filing a duplicative individual lawsuit when that class member already is putatively represented by the class action. Moreover, such a requirement would contradict the premise of *American Pipe* – that a class action is "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

*Second*, "extraordinary circumstances justifying tolling" exist. Pet. Br. 30. Petitioner concedes (at 30) that "avoid[ing] direct conflict with the policies underlying Rule 23" is an extraordinary circumstance that justifies tolling with respect to the individual claims of class members. Once that point is conceded, petitioner's argument vanishes not only because a live claim may be pursued through any procedures available under the federal rules, but also because, as explained above, all of the policies underlying class tolling – including furtherance of Rule 23's policies – support the application of class tolling to subsequent class actions. *See supra* Part II.C.

### B. Petitioner's Policy Arguments Are Overstated And Best Addressed Through Other Means

Petitioner warns (at 46) that applying class tolling to subsequent class actions causes "serious adverse policy consequences." Petitioner warns (at 46-48) that plaintiffs will bring "'stacked' class actions," taking

advantage of "abusive" "perpetual tolling" that will lead to "serial relitigation of class actions even when the validity of class certification has already been litigated and rejected." Petitioner's *amici* raise similar concerns. *See, e.g.*, DRI Br. 18-28; Chamber of Commerce Br. 19-25.

Any policy preference for fewer class actions does not justify repudiating this Court's precedents regarding class tolling or adopting a rule that contravenes Rule 23 and the Rules Enabling Act. *See supra* Parts I-II. The proper outlet for petitioner's policy concerns is Congress, or the process for amending the Federal Rules of Civil Procedure. *See Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017). In any event, for the reasons explained below, petitioner's policy concerns are overstated.

**1.a.** This Court already considered and unanimously dismissed petitioner's policy concerns in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), a case in which the defendant argued that a class-certification denial should preclude subsequent class actions. The defendant argued, much like petitioner argues here, that such a rule was required because otherwise "class counsel can repeatedly try to certify the same class 'by the simple expedient of changing the named plaintiff in the caption of the complaint,'" leading to "'serial relitigation of class certification.'" *Id.* at 316 (quoting Br. for Resp. 2, 12, 47-48, *Smith*, No. 09-1205 (U.S. filed Dec. 13, 2010), 2010 WL 5125435).

The Court concluded that federal courts have mechanisms "to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.* at 317. The Class Action Fairness Act of 2005 facilitated removal of class actions to federal court, and similar class actions can be centralized

before a single judge. *See id.* Most notably, this Court concluded that "principles of *stare decisis* and comity among courts" sufficed to address policy concerns regarding subsequent class actions, noting that "we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.*

**b.** Notwithstanding this Court's endorsement of comity as an effective limitation on subsequent class actions, petitioner erroneously contends (at 49) that comity is "weak at best." District court practice since *Smith*, however, demonstrates that comity is a workable mechanism for courts to adjudicate subsequent class actions.

Applying principles of comity, district courts have rejected subsequent class actions where the rationale of an earlier class-certification denial would preclude certification, while allowing subsequent class actions to proceed if the plaintiff can show that the prior class-certification denial does not demonstrate inappropriateness of class treatment of the subsequent class action. On one side, many cases deny certification using comity.[9] On the other side, courts understand

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[9] *See, e.g., McCabe v. Lifetime Entm't Servs., LLC*, No. 17-CV-908-ERK-SJB, 2018 U.S. Dist. LEXIS 3212, at *47 (E.D.N.Y. Jan. 4, 2018) (report and recommendation) (class could not be certified because "this Court would *also* be obligated to follow – whether through comity, stare decisis or the basic precept that District Courts follow the law of the circuit – the Second Circuit's decision finding that Judge Hellerstein was correct in denying certification of the same class pled here"); *Ott v. Mortgage Inv'rs Corp. of Ohio*, 65 F. Supp. 3d 1046, 1063-64, 1067 (D. Or. 2014) (applying comity to strike class allegations where "another court has denied class certification of two of the virtually same classes," and "[t]here is no reason for this court to believe that [plaintiff's] evidence will differ in this action"); *Murray v. Sears, Roebuck & Co.*, No. C 09-5744 CW, 2014 WL 563264, at *6 (N.D. Cal. Feb.

the proper role in comity-based analyses of subsequent class-certification efforts.[10] Courts also have adopted and discussed a standard for applying comity propounded by the American Law Institute ("ALI").[11]

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12, 2014) (following previous class-certification denial decision as "persuasive" and "provid[ing] strong guidance"); *Williams v. Winco Foods*, No. CV 13-00146 CRB, 2013 WL 4067594, at *2 (N.D. Cal. Aug. 1, 2013) ("Because Plaintiffs have not addressed the reasoning underlying this Court's previous denial of certification in *Gales*, the Court GRANTS Defendants' Motion to Deny Class Certification."); *Baker v. Home Depot USA, Inc.*, No. 11 C 6768, 2013 WL 271666, at *5 (N.D. Ill. Jan. 24, 2013) (striking class allegations where "many of the same problems identified by the courts in [earlier class-certification denials] with respect to class certification are similarly present in this case"); *Edwards v. Zenimax Media Inc.*, No. 12-cv-00411-WYD-KLM, 2012 WL 4378219, at *4 (D. Colo. Sept. 25, 2012) (finding past class-certification denial "highly persuasive and relevant" in granting motion to strike class allegations).

[10] *See, e.g., Ford v. Ford Motor Co.*, No. CV 13-8335 PSG (SSx), 2014 WL 12570925, at *4 (C.D. Cal. Jan. 17, 2014) (rejecting "imposing any kind of comity-based burden on Plaintiffs" because prior class action "involve[d] different legal claims"); *Heibel v. U.S. Bank Nat'l Ass'n*, No. 2:11-CV-00593, 2012 WL 4463771, at *4 (S.D. Ohio Sept. 27, 2012) (prior class-certification denial did not dictate denial in subsequent action because "it appears that Plaintiffs in this case have produced more evidence – than the plaintiff in [the prior action] – to establish that they are similarly situated to members of the potential class").

[11] *See Baker v. Microsoft Corp.*, 797 F.3d 607, 617-19 (9th Cir. 2015) (Bea, J., concurring in the result), *rev'd and remanded on other grounds*, 137 S. Ct. 1702 (2017); ALI, *Principles of the Law of Aggregate Litigation* § 2.11 (2010) ("*Principles*"). This section of the ALI's *Principles*, which this Court cited in crafting its holding in *Smith*, 564 U.S. at 316 n.11, states that "[a] judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity." *Principles* § 2.11. The ALI noted

**c.** Where district courts follow a prior class-certification denial under principles of comity, they have procedural tools to manage the action efficiently. District courts can excise class claims at the pleading stage, *see, e.g.*, *Ott*, 65 F. Supp. 3d at 1061-70; *Baker*, 2013 WL 271666, at *4-5, and require that the pleadings be amended to eliminate class allegations pursuant to Rule 23(d)(1)(D), *see, e.g.*, *Edwards*, 2012 WL 4378219, at *2-3. A district court also can preclude class discovery when a class-certification denial on comity grounds is warranted. *See Williams*, 2013 WL 4067594, at *1-2; *Edwards*, 2012 WL 4378219, at *6.

**d.** Although petitioner erroneously paints this lawsuit as an example of abuse (at 49-50), it actually illustrates the safeguards this Court identified in *Smith* operating as intended. After Judge Klausner denied class certification in *Dean*, the *Smyth* plaintiffs originally filed in the District of Delaware, where petitioner is incorporated. JA50, 57 (¶¶ 19, 41). The district court then transferred the action to the Central District of California, where it was assigned to Judge Klausner.

This transfer gave Judge Klausner the opportunity to evaluate whether his denial of class certification in *Dean* demonstrated the inappropriateness of class certification in *Smyth* under principles of comity. He concluded that it did not. Because the *Smyth* motion for class certification addressed the specific deficiencies identified in the *Dean* motion, *see supra* p. 11, the court concluded that comity was unwarranted because "it is not clear that the reason the Court denied class

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that "[t]he expectation of this Section is that situations for rebuttal of the presumption stated here may arise more frequently than situations with respect to some other presumptions used in the law." *Id.* cmt. c.

certification in *Dean* applies equally to this case." JA264. The *Dean* class-certification denial "was based on a finding that one of the Plaintiffs' own experts had failed to demonstrate market efficiency. Plaintiffs in this action have submitted entirely new expert declarations. Given the different factual showings in each case, it would be improper to decide class certification issues based solely on comity." *Id.*

Notably, in response to the *Smyth* plaintiffs' motion for class certification, petitioner did not even argue that common issues failed to predominate over individual issues, nor did petitioner attempt to rebut the extensive statistical analysis put forward by plaintiffs' expert to prove market efficiency. *See* China Agritech Class Cert. Opp., *Smyth* Action, Dkt. 93. Instead, petitioner argued solely that the court should follow its class-certification denial in *Dean* as a matter of comity (an argument the court rejected) and that the *Smyth* class representatives failed to demonstrate typicality and adequacy (arguments the court accepted). *See id.* at 9-20; JA255-62.

These circumstances confirm that respondents' subsequent class action was appropriate, not abusive. As the ALI has concluded, application of comity to deny class treatment in a subsequent class action is inappropriate "when the basis for the earlier denial . . . is no longer present in a subsequent proceeding." *Principles* § 2.11 cmt. c. That is true here, because the reasons for denying class certification in both *Dean* and *Smyth* are absent. Respondents included allegations not included in the *Dean* complaint regarding the *Cammer* factors that the district court found unproven in *Dean*: coverage by securities analysts and the effect of corporate news on stock price. *See* JA107-09 (¶ 155h, k). Like the *Smyth* plaintiffs, respondents

would seek to prove market efficiency with expert analysis that remedied the deficiencies the district court identified in the expert reports in *Dean*. Moreover, petitioner never has contended that the typicality and adequacy issues in *Smyth*, which involved the relationship between the *Dean* and *Smyth* plaintiffs and the conduct of their shared counsel, are present in this action (filed by different counsel on behalf of different class representatives, who have no relationship with the plaintiffs from *Smyth* or *Dean*).

**2.** In light of this Court's holding in *ANZ*, the "perpetual tolling" of which petitioner warns (at 46-47) is literally impossible in this case, other securities class actions, or any other case with claims subject to a statute of repose. In *ANZ*, this Court held that statutes of repose are immune from class tolling. 137 S. Ct. at 2051. The Rule 10b-5 claims in this case are subject to a 2-year limitations period and a 5-year statute of repose, *see* 28 U.S.C. § 1658(b), and other securities claims are subject to a 1-year limitations period and a 3-year statute of repose, *see, e.g.*, 15 U.S.C. § 77m. The 5-year repose period has expired in this case, *see* JA46-47 (¶ 1) (class period ended March 11, 2011), meaning that the *Resh* class action is the last possible class action (or lawsuit of any kind) that petitioner will face. In securities class actions, the application of *American Pipe* creates no risk of "perpetual tolling," but simply creates the possibility that class tolling may extend the limitations period, until the statute of repose's cutoff, by no more than 3 years (or 2 years in cases subject to 1- and 3-year time bars).

Petitioner's arguments confuse the distinct operations and purposes of statutes of limitation and statutes of repose. According to petitioner, a statute of limitations is a "strict time limit" providing "finality" and a

"cut off" of all liability. Pet. Br. 4, 17, 21-22. Even if that statement accurately describes a statute of repose, it does not correctly depict a statute of limitations. A statute of repose "puts an outer limit on the right to bring a civil action" and serves as "a cutoff" of liability, thus "effect[ing] a legislative judgment that a defendant should be free from liability" and giving the defendant "a fresh start." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014). By contrast, statutes of limitations "are subject to equitable tolling," because tolling is consistent with a statute of limitations' purpose to "'promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* at 2183 (quoting *R.R. Telegraphers*, 321 U.S. at 348-49) (alteration in original). Even as the Court held last Term that *American Pipe* tolling does not apply to a statute of repose, *see ANZ*, 137 S. Ct. at 2051, the Court reaffirmed that statutes of limitations are subject to *American Pipe* tolling, *see id.* at 2051-52. The fact that respondents' claims are subject to a statute of repose illustrates the inappropriateness of petitioner's attempt to import the policies behind statutes of repose into the operation of the applicable statute of limitations.

**3.** Given the effective mechanisms available to handle subsequent class actions, it is unsurprising that petitioner and its *amici* have advanced no evidence of any pattern of "abusive" subsequent class actions in any of the circuits that apply *American Pipe* to subsequent class actions. The Sixth and Seventh Circuits have applied *American Pipe* to subsequent class actions since 2015 and 2011, respectively. *See Phipps*, 792 F.3d at 644; *Sawyer*, 642 F.3d at 563-64.

The Third, Eighth, and Ninth Circuits have applied *American Pipe* to subsequent class actions in at least some circumstances for more than a decade. *See Catholic Social Servs., Inc. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc); *Yang v. Odom*, 392 F.3d 97, 104-08 (3d Cir. 2004); *Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007).

In *ANZ*, the Court concluded that the plaintiff's concern that not applying *American Pipe* tolling to statutes of repose would lead to a flood of duplicative filings "likely [we]re overstated" because there had been no "evidence of any recent influx of protective filings in the Second Circuit," which had adopted the defendant's rule in 2013. 137 S. Ct. at 2054. By the same token, petitioner's failure here to offer any evidence of any influx of abusive, stacked class actions renders hollow its parade of horribles. Plaintiffs' counsel are unlikely to bring subsequent class actions when a class-certification denial makes clear that the claims could not be suitable for class treatment. *See* Pet. App. 22a ("Attorneys who are going to be paid on a contingency fee basis, or in some cases based on a fee-shifting statute, at some point will be unwilling to assume the financial risk in bringing successive suits."). Although petitioner mocks the notion of attorney "self-restraint," Pet. Br. 48, contingency class counsel are rational economic actors and have no incentive to throw good money after bad. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) ("Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid.").

## IV. PETITIONER'S PROPOSED LIMITATION ON CLASS TOLLING WOULD CAUSE INEQUITABLE OUTCOMES

1. Petitioner's position, not the Ninth Circuit's faithful application of *American Pipe*, would cause adverse policy consequences. Petitioner's advocacy (at 54-57) of an alternative position permitting class tolling for subsequent class actions in some circumstances is an implicit concession that its main position is overly harsh and inequitable.

There are many circumstances in which it clearly would be inequitable to deny class tolling to a subsequent class action. For example, where class certification is denied in a prior action "based solely on deficiencies of the class representative," there is no basis to deny tolling "for filing a later, substantively identical action with a new representative." *Yang*, 392 F.3d at 112 (Alito, J., concurring and dissenting). Similarly, if a class action is dismissed because the class representative is found to lack standing, class members should not be deprived of the opportunity to find a new representative with standing to represent the class. Petitioner's position also would permit class defendants to escape class liability forever by buying off a putative class representative with an individual settlement after the limitations period expires for other putative class members.

Moreover, in securities class actions, petitioner's position, taken to its extreme, could prevent the operation of the PSLRA as intended by Congress. The PSLRA requires that a class plaintiff provide notice of the class action within 20 days of filing the complaint and gives class members 60 days following notice to move for lead plaintiff status. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). The PSLRA directs the district court,

within 90 days of the notice, to appoint the "most adequate plaintiff" as lead plaintiff. *Id.* § 78u-4(a)(3)(B)(i). If the appointed lead plaintiff is different from the named plaintiff who filed the complaint, that plaintiff must file an amended class-action complaint to represent the class.[12] The operation of the PSLRA thus depends on the notion that a previously absent class member will file a subsequent class-action complaint several months after the filing of the original class action. A defendant conceivably could argue that such a complaint would be untimely absent *American Pipe* tolling. If a court accepted that argument, petitioner's position would functionally force the court to choose the original named plaintiff as lead plaintiff, rather than the most adequate plaintiff as Congress intended.

Petitioner contends (at 41) that class tolling would be contrary to the PSLRA's policy of encouraging class representatives to come forward early "to allow the district court to pick the best lead plaintiff." But the PSLRA makes the plaintiff with the largest financial interest the presumptive most adequate plaintiff, *see* 15 U.S.C. § 78u-4(a)(3)(B)(iii), in order to incentivize large institutional investors to serve as class representatives, *see* Weiss, 61 Vand. L. Rev. at 548-50. Where a large investor has moved for lead plaintiff status and that investor has no facial inadequacies, an investor with a smaller financial interest would have no realistic chance of being appointed lead plaintiff, nor a

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[12] *See* Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby"*, 61 Vand. L. Rev. 543, 564 n.85 (2008).

need to seek such appointment to protect the class's interests.[13]

**2.** Petitioner's alternative position is that the Court should adopt the Third Circuit's holding in *Yang* that *American Pipe* can apply to subsequent class actions where class certification has been denied "on the basis of the lead plaintiffs' deficiencies," but not where there has been a "class-based determination" against class certification. 392 F.3d at 110-11.

Petitioner incorrectly asserts (at 57-59) that adoption of the *Yang* holding would render respondents' class claims time-barred. In the prior class action in *Yang*, the court had denied certification of a Rule 10b-5 class because of failure to prove entitlement to the fraud-on-the-market presumption. 392 F.3d at 108-09. The *Yang* court noted that, even though "the deficiencies mentioned by the court often indicate defects in the class itself," the prior court's reasoning demonstrated that the denial turned on the specific class representative's failure "to meet *his* burden" to prove entitlement to the presumption of reliance. *Id.* at 109. The same is true here. The district

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[13] In all three class actions leading up to this case, the district court failed to follow the PSLRA's command that the district court "shall appoint" the most adequate plaintiff as lead plaintiff within 90 days of publication of notice. SJA1-6, 7-11, 58-63; 15 U.S.C. § 78u-4(a)(3)(B)(i). In *Smyth*, because class notice occurred on October 8, 2012, the district court was required to make the lead plaintiff determination by January 7, 2013. Had the court done so, it could have ferreted out the *Smyth* class representatives' inadequacy before the expiration of the 2-year limitations period on February 3, 2013. An adequate class representative could then have filed a timely class action, and class members never would have needed to rely on class tolling. Petitioner's arguments regarding the proper function of the PSLRA ignore the departures from the PSLRA's requirements in this case.

court concluded in its *Smyth* decision that the class-certification denial in *Dean* was caused by deficiencies in the expert reports submitted by the *Dean* plaintiffs, and accordingly the decision did not cast doubt on the appropriateness of the underlying claims for class treatment. JA264.

In any event, petitioner's alternative position is insufficient to prevent inequitable outcomes. Many situations exist in which a subsequent class action is appropriate even after a class-certification denial that can be characterized as class-based. For example, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), this Court held that a nationwide class in a gender discrimination lawsuit against Wal-Mart failed to satisfy Rule 23 because the plaintiffs could not show that Wal-Mart operated nationwide under a common policy of discrimination. *Id.* at 353-60. Wal-Mart employees took this Court's guidance to heart by filing a series of regional class actions, seeking to prove the existence of common discriminatory policies in more localized areas. *See Phipps*, 792 F.3d at 642.

Filing a subsequent class action to incorporate a court's guidance and remedy a deficiency identified in a prior class-certification decision upholds the rule of law and does not reflect abusive practice. "[E]ven if the problem in the initial class action is with the class itself," a subsequent class action is appropriate "as long as the complaint in the successive class action seeks to 'cure the deficiency' identified in the earlier class action." Wasserman, 58 Fla. L. Rev. at 857. As noted above, both the *Smyth* and the *Resh* class actions sought to cure the deficiency in the *Dean* class action by presenting additional allegations and expert evidence regarding market efficiency, and the district court determined in *Smyth* that the deficiency it identified in *Dean* no longer was present. *See supra* p. 11.

Rather than making the application of *American Pipe* hinge on the reason for denial of class certification in an earlier class action, comity provides the effective mechanism for district courts to determine which subsequent class actions should go forward. As petitioner's *amici* acknowledge, the distinction between class-based and representative-based class-certification denials can be elusive. *See* SIFMA Br. 20. Comity turns not on formalistic distinctions but on the district court's pragmatic consideration of whether "the basis for the earlier denial . . . is no longer present in a subsequent proceeding." *Principles* § 2.11 cmt. c.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# ADDENDUM

Federal Rule of Civil Procedure 23 provides, in relevant part:

**Rule 23. Class Actions**

**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

**(1)** the class is so numerous that joinder of all members is impracticable;

**(2)** there are questions of law or fact common to the class;

**(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

**(4)** the representative parties will fairly and adequately protect the interests of the class.

**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

**(1)** prosecuting separate actions by or against individual class members would create a risk of:

**(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

**(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

**(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the

class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

**(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

**(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;

**(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;

**(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

**(D)** the likely difficulties in managing a class action.

* * *

**(d) Conducting the Action.**

**(1)** ***In General.*** In conducting an action under this rule, the court may issue orders that:

**(A)** determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

**(B)** require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

**(i)** any step in the action;

**(ii)** the proposed extent of the judgment; or

**(iii)** the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

**(C)** impose conditions on the representative parties or on intervenors;

**(D)** require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

**(E)** deal with similar procedural matters.

**(2)** ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

* * *

No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner,*
v.
MICHAEL RESH, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## ARGUMENT

Respondents' answering brief only confirms why the Ninth Circuit's decision extending tolling of the statute of limitations under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to follow-on class actions must be reversed.

*American Pipe* held that the filing of a class action tolls the limitations period to allow former absent class members to file their own individual claims after the class fails. Tolling was justified because the two preconditions of equitable tolling—plaintiff diligence and extraordinary circumstances—were satisfied. Specifically, the Court held that class members who rely on the class while it is pending and then file their own individual claims have not sat on their rights. And tolling was required to prevent the proliferation of individual protective actions by class members while a class was still pending, a result that would undermine the policies embodied in Rule 23.

Petitioner's opening brief demonstrated that neither of these elements is satisfied when former class members bring follow-on *class* rather than individual actions. Absent class members who do nothing to protect their rights when class certification is denied obviously have exercised no diligence. And tolling for follow-on class actions is not required to protect any Rule 23 policy.

Respondents' main answer is not that these equitable tolling elements are satisfied for follow-on class actions, but rather that equity is irrelevant because *American Pipe* tolling is automatic for every class member in all circumstances—even for class mem-

bers who do nothing to protect their rights. Thus, respondents argue, *American Pipe* tolling applies equally to every former class member's individual claim, and those individual claims can be aggregated if Rule 23 is otherwise satisfied.

But this Court has repeatedly held that *American Pipe* announced a rule of equitable—not automatic—tolling, so the question is always whether tolling is warranted in the circumstances based on traditional elements of equity. Respondents are thus wrong when they say that every former class member's claim is timely under *American Pipe*, so all that matters is whether those claims can be aggregated under Rule 23. Rather, every former class member's claim is *untimely* because the statute of limitations has run, and the question is whether equity nevertheless requires allowing them to proceed under the circumstances. And the traditional elements of equity are satisfied only when former absent class members themselves file *individual* claims after the class fails—and not when other former class members purport to bring a new class action on their behalf.

Respondents' position, in other words, rests on a fundamental misunderstanding of *American Pipe* tolling, and of equitable tolling more generally. Nor do respondents have any convincing answer to the fact that extending *American Pipe* to follow-on class actions would result in significant adverse consequences—including the prospect of abusive serial class litigation—that cannot be reconciled with Congress's decision to enact a statute of limitations. The decision below should be reversed.

### A. *American Pipe* Recognized a Rule of Equitable Tolling Based on Traditional Equitable Principles, Not a Rule of Automatic Tolling

1. *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), allowed tolling of statutes of limitations during the pendency of a class action to permit *individual* absent class members to file *individual* claims once the class failed. *See* Pet. Br. 26–30. This tolling decision rested on two necessary preconditions, derived from the two traditional elements of equitable tolling: plaintiff diligence and "extraordinary circumstances" justifying tolling. *See* Pet. Br. 25–36 (citing, *inter alia*, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016)).

In particular, absent class members exercise diligence when they assert their rights by filing their own claim when a potential class fails. *Crown, Cork*, 462 U.S. at 352–53; *see also Am. Pipe*, 414 U.S. at 554; Pet. Br. 34. And extraordinary circumstances justify tolling because without tolling, absent class members who want to protect their rights would file individual claims before the statute of limitations runs, which would undermine Rule 23's specific policy of encouraging representative actions rather than a "needless multiplicity" of individual ones—that is, tolling is *required* to avoid conflict with Rule 23 policies. *Crown, Cork*, 462 U.S. at 351; *see also Am. Pipe*, 414 U.S. at 553–54; Pet. Br. 38.

But the fact that these equitable preconditions are satisfied when absent class members file *individual* claims after a class fails does not mean that

they are satisfied when class members file follow-on class actions. Whether equitable tolling is also warranted in this latter circumstance is the core dispute in this case. And neither plaintiff diligence nor Rule 23 policy justifies extending *American Pipe* tolling to otherwise-untimely class actions, so the class action in this case is time-barred. *See* Pet. Br. 30–45; *infra* Section B.

2. a. According to respondents, class members need not assert their own individual claims to get the benefit of tolling because the two equitable tolling factors are irrelevant under *American Pipe*. Respondents contend that *American Pipe* establishes an automatic tolling rule for every class member once a class action is filed—even class members who do nothing to protect their rights. Resp. Br. 21–26.

Indeed, the explicit premise of respondents' brief is the assertion that "every class member ha[s] a timely individual claim." Resp. Br. 15. Respondents reason that if every class member has a timely claim, then a class aggregating those claims must also be timely. That result, respondents contend, follows from *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), which held that Rule 23 allows individuals who possess a valid claim to aggregate those claims so long as the preconditions of the Rule are otherwise satisfied. And it follows from the Rules Enabling Act, under which evidence relevant to an individual claim or defense must necessarily be relevant to a class action claim. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). If the filing of a class action automatically tolls the limitations period for all individu-

al claims, that same class action must also toll the limitations period for a subsequent class action.

b. Respondents would be right if *American Pipe* were an automatic tolling rule rendering every class member's claim timely. *American Pipe*, however, is not an automatic tolling rule but rather an *equitable* tolling rule subject to the general rules of equity. This Court made that clear just last Term, holding that *American Pipe* tolling was not "mandated by the text of a statute or federal rule" such as Rule 23 but "was instead grounded in the traditional equitable powers of the judiciary." *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2052 (2017); *see* Pet. Br. 26.

Respondents' assertion that "[p]etitioner's equitable arguments cannot overcome the force of Rule 23 and the Rules Enabling Act," Resp. Br. 18, is thus backwards. The question is not whether class members' timely claims can be aggregated under Rule 23, but whether class members' otherwise *untimely* claims should nevertheless be allowed to proceed as a matter of equity. And as this Court has repeatedly explained, equitable tolling is never automatic; it applies only when the plaintiff carries his burden to demonstrate "that he has been pursuing his rights diligently" *and* when tolling is otherwise justified by "extraordinary circumstances." *Menominee*, 136 S. Ct. at 755–56; *see also Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); Pet. Br. 30–31. Indeed, courts may not apply equitable tolling rules that "break with historic principles of equity," *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946), or that are "completely divorced from long-settled equitable-tolling

principles," *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012). Such an approach would amount to courts impermissibly "overrid[ing] the statute of limitations Congress prescribed," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014), and "mak[ing] the law instead of administering it," *Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (internal quotation marks omitted); *see* Pet. Br. 45–46 (explaining why this result violates the separation of powers). There is no basis for treating the variant of equitable tolling recognized under *American Pipe* as somehow exempt from these strictures.

3. Respondents' contrary position is based on mischaracterizations and out-of-context quotations of this Court's cases.

Respondents rely most heavily on this Court's statement in *American Pipe* that the filing of a class action "suspends the applicable statute of limitations as to all asserted members of the class," *Am. Pipe*, 414 U.S. at 554, contending that this passage means that "a timely class action tolls the limitations period for *all* asserted class members." Resp. Br. 30. But as *Crown, Cork* explained, quoting this exact language, *see* 462 U.S. at 353–54, the point of this passage was that tolling applies to any class members *who file individual claims*. That is why the very next sentences of *Crown, Cork* explain that the statute is only tolled "until class certification is denied," at which point "class members may choose to *file their own suits or to intervene* as plaintiff in the pending action." *Id.* at 354 (emphasis added).

Indeed, in the cases respondents cite applying *American Pipe*, the plaintiff seeking tolling exercised

diligence by filing her own individual claim. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) (plaintiff filed individual action after opting out of class); *Chardon v. Fumero Soto*, 462 U.S. 650, 653 (1983) (individual claims following denial of class certification).[1] Respondents believe that these cases stand for the proposition that *American Pipe* applies in every procedural context and thus must apply to subsequent class actions, Resp. Br. 30, but the cases merely reiterate that equitable tolling can apply in any context when a former class member presses her own individual claim. *See supra* at 3–4.

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[1] Respondents also cite *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), but in that case the Court held that *American Pipe* did not apply to the question of appellate intervention at issue. *Id.* at 392. The Court did note, however, that *American Pipe* would have applied "if the respondent had sought to intervene in order to join the named plaintiffs in litigating her individual claim." *Id.* *McDonald* thus confirms that *American Pipe* has been limited to when class members seek to press their own individual claims.

Respondents' reliance on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), is even more off point. *Devlin* had nothing to do with tolling—the question was whether absent members of a certified class are "parties" for purposes of the right to appeal an approved class settlement. In explaining why absent class members are like "parties" in some respects but not in others, the Court cited *American Pipe* for the proposition that they are "parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." *Id.* at 10. Respondents think that this statement supports an automatic tolling rule, Resp. Br. 30–31, but it says nothing on the question presented here: can absent class members get the benefit of equitable tolling *if they do nothing*.

The question in *this* case, by contrast, is whether the elements of equitable tolling are met when former class members *do not* take action to enforce their own rights, but instead continue to remain absent. For the reasons explained below, the answer is no.

### B. Extending *American Pipe* to Follow-On Class Actions Would Violate Both Equitable Tolling Preconditions

Unlike with tolling of absent class members' individual claims, applying *American Pipe* to follow-on class actions would (i) impermissibly reward non-diligent plaintiffs and (ii) not further any Rule 23 policy.

1. Extending *American Pipe* to follow-on class actions would flout the diligence requirement in two respects.

a. Former absent class members who continue to remain absent rather than asserting their own rights by definition have not exercised diligence. Pet. Br. 35–37.

Respondents' answer is that an absent class member automatically satisfies the diligence requirement so long as a putative class action is pending. Resp. Br. 35–36. Respondents cite this Court's statement in *Crown, Cork* that absent class members "cannot be accused of sleeping on their rights" if they fail to act while the initial class action is pending, Resp. Br. 35 (quoting *Crown, Cork*, 462 U.S. at 352–53), and reason that the same holds true while the second (and third, fourth, and so on) class action is pending as well. According to respondents, absent

class members show their diligence simply by pointing to the existence of any "timely class action itself." *Id.* (emphasis omitted).

Respondents are incorrect. It is true that under *American Pipe* and *Crown, Cork*, an absent class member's decision not to file an individual action during the pendency of a class action does not by itself demonstrate a *lack* of diligence, since an individual who seeks to enforce her own rights can reasonably rely on a pending class action. *See, e.g.*, *Crown, Cork*, 462 U.S. at 352–53. But how has an absent class member who continues to sit back once class certification is denied acted diligently? She obviously has not, because it is the "[f]iling [of the lawsuit] itself"—not waiting to see whether serial class actions succeed—that "shows the proper diligence on the part of the plaintiff." *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962); *see also McQuiddy v. Ware*, 87 U.S. 14, 19 (1873) ("[P]ersonal diligence . . . is required . . . to bring into activity the powers of a court of equity.").

Certainly, respondents have not cited a single case even suggesting that a plaintiff who has never lifted a finger to protect her rights—even after a court has held that her claims are not suitable for class treatment—might be entitled to the "rare remedy" of equitable tolling. *Wallace v. Kato*, 549 U.S. 384, 396 (2007). After all, if a potential plaintiff does not *ever* seek to assert her own rights, there is no reason to believe that the plaintiff has any interest in pursuing them. That is why both *American Pipe* and *Crown, Cork* describe the applicable rule as applying to "all purported members of the class *who*

*make timely motions to intervene*," *Am. Pipe*, 414 U.S. at 553 (emphasis added), or who "file their own suits" after class certification is denied, *Crown, Cork*, 462 U.S. at 354. And because absent members of a follow-on class have done nothing to assert their rights, basic equitable principles—not to mention the Rules Enabling Act, *see* Pet. Br. 54—prevent affording them the benefit of tolling. That suffices to defeat respondents' position.

b. Formerly absent class members who, like respondents, later seek to lead a class action have also failed to exercise diligence sufficient to justify tolling. A diligent class member who wants to represent a class would file a class action within the limitations period; she would not strategically wait until after another class member tries and fails to secure certification. Petitioner explained this basic point, Pet. Br. 35–36, yet respondents do not even attempt a response. The plaintiff-diligence requirement is not satisfied in follow-on class actions for this independent reason.

2. An extension of *American Pipe* to follow-on class actions should also be rejected because no "extraordinary circumstances" justify it. Pet. Br. 37–45. In particular, the Rule 23 policy that supports tolling for individual actions—i.e., preventing the "multiplicity" of individual actions Rule 23 is meant to avoid, *see Am. Pipe*, 414 U.S. at 551; *Crown, Cork*, 462 U.S. at 351—does not apply to follow-on class actions.

Respondents at times suggest that their proposed tolling rule could be justified based only on "the judiciary's institutional interest in litigative efficiency

and economy." Resp. Br. 28 (internal quotation marks omitted). But courts have no free-roving "authority to rewrite" statutory deadlines in pursuit of "judicial economy." *ANZ*, 137 S. Ct. at 2053 (internal quotation marks omitted); *see also Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) ("We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (similar). It is principally Congress's judgment about judicial economy that counts, and Congress decided here to enact a two-year time bar, subject only to the "rare remedy" of equitable tolling. *Wallace*, 549 U.S. at 396. The question is whether tolling is *required* to avoid conflict with policies reflected in Rule 23. *See Am. Pipe*, 414 U.S. at 551; *Crown, Cork*, 462 U.S. at 351. Respondents offer no persuasive argument that it is.

a. Respondents' principal argument is that requiring class actions to be filed within the limitations period will result in the filing of "protective" class actions—a consequence that respondents believe should be avoided for the same reason *American Pipe* sought to avoid the filing of protective individual actions. Resp. Br. 33. This argument is both factually and legally incorrect.

As an initial matter, requiring the timely filing of class actions is not likely to result in a material number of "protective" class actions because any class member who desires to lead the class already has every incentive to file a class action as soon as possible. Pet. Br. 39. That is because if the original

class is certified and its leader appointed, those who hang back will not be able to realize their desire. Respondents speculate that there might be class members who do not want to represent a class but would nevertheless come forward late in order to ensure that "class members are represented" by someone. Resp. Br. 34. Respondents offer no reason to believe that any substantial number of such deferential, altruistic class representatives exist. And if a rule enforcing statutory time bars against follow-on class actions would lead to unwarranted protective class filings, then there would be evidence of such lawsuits in the numerous circuits that have for *decades* applied that rule.[2] Respondents have offered none. *See ANZ*, 137 S. Ct. at 2054 (dismissing similar concern as "likely . . . overstated").

In any event, even if respondents were right, it would not matter because unlike with the Rule 23 policy of avoiding a proliferation of *individual* actions, there is no Rule 23 policy of avoiding the filing of multiple class actions. To the contrary, Rule 23 policies promote the filing of early class actions, because that facilitates courts' ability to choose adequate representatives and counsel at an "early practicable time," Fed. R. Civ. P. 23(c)(1); *see also* Pet. Br. 40, thereby ensuring that class certification is fairly litigated from the outset. And the PSLRA makes the preference for early participation by all interested plaintiffs explicit, Pet. Br. 41, so if re-

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[2] *See, e.g.*, *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985); *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994); *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998).

spondents are right that their rule would discourage early participation, that rule should be rejected as inconsistent with congressional policy reflected in the PSLRA. Respondents argue that smaller shareholders may often lack incentive to seek lead-plaintiff status because courts prefer to appoint larger shareholders. Resp. Br. 49. But Congress intended for anyone who wants to lead a class to come forward early so that the court can choose the best candidate, and respondents' proposed rule would explicitly contradict that preference.

Finally, any marginal increase in "protective class filings" would not imperil any statutory interest because federal courts have extensive experience managing multiple class actions and access to numerous congressionally-provided and judge-made tools to do so. *See* Pet. Br. 41–42; *see also* S. Rep. No. 109-14, at 52–54 (2005) (noting that "federal courts can coordinate 'copy cat' or overlapping class actions" and have experience managing "even 100 class actions filed on the same subject matter"). Respondents have no answer.

b. Respondents' secondary argument is that "judicial economy" would be served by a tolling rule for follow-on class actions because otherwise, "defendants will face a multitude of individual actions" by formerly-absent class members once any timely-filed class actions fail. Resp. Br. 34. That argument makes no sense. There is no Rule 23 policy against individual actions by former class members once a class fails. If there were, then *American Pipe* and *Crown, Cork* would have come out the other way—those decisions expressly *encouraged* individual class

members to file individual actions once class certification failed. Regardless, respondents' proposed rule would in all likelihood only delay the proliferation of individual actions, not avoid it, because class members would still have every incentive to bring their own individual claims once the second (or third, or fourth) class action fails. Respondents' rule thus implicitly rests on the proposition that a follow-on class action is likely to succeed where the original class action failed. The problem with that assumption (besides its improbability) is that it essentially *requires* inconsistent class certification judgments. *See* Pet. Br. 56. And in any event, if defending a single class action rather than many individual actions would be easier for a particular defendant, then that defendant would simply acquiesce to class certification.[3]

In short, plaintiff diligence and extraordinary circumstances—the two equitable preconditions that justified tolling for individual actions in *American Pipe*, and that must be satisfied to warrant equitable tolling more generally, *see supra* at 3—do not apply to follow-on class actions. Respondents' attempt to

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[3] Respondents also argue that allowing tolling here creates no "unfair surprise" to defendants. But respondents admit that "the absence of unfair surprise is not an independent basis for tolling," Resp. Br. 37 n.8; *see also* Pet. Br. 42, so the lack of unfair surprise is irrelevant. Respondents are also wrong. No defendant reasonably expects that the filing of a single class action will result in an endless stream of identical, difficult-to-defend class actions despite the existence of a statute of limitations. *See* Pet. Br. 43–45.

extend *American Pipe* to follow-on class actions should thus fail.

### C. Extending *American Pipe* to Follow-On Class Actions Would Lead to Serious Adverse Policy Consequences Inconsistent with the Purposes of Statutes of Limitations

1. The foregoing suffices to reverse the decision below. But respondents' rule also would result in significant adverse policy consequences contrary to the very purposes of statutes of limitations.

Specifically, expanding *American Pipe* tolling to follow-on class actions "could extend the statute of limitations almost indefinitely." *Yang v. Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J. concurring); *see also* Pet. Br. 46-47. That consequence would conflict with the basic policies underlying all statutes of limitation: plaintiff diligence, defendant repose, and eliminating stale claims. Pet. Br. 24, 47. And as this Court has made clear, a rule that allows a limitations period to "continue indefinitely," even "in principle," "conflicts with a basic objective—repose—that underlies limitations period," *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997), and "is out of step with the purpose of limitations periods in general," *Credit Suisse*, 566 U.S. at 227–28.

2. Respondents offer several reasons why other doctrines might in some circumstances mitigate the negative consequences of extending *American Pipe* to follow-on class actions. Even if that were true, it would be no reason to ignore a congressionally-enacted time bar, the purpose of which is to provide

a clear and uniform end date to a claim, subject only to narrow exception when the traditional equitable tolling factors are met. Respondents' arguments, moreover, are unconvincing on their own terms.

a. Respondents correctly argue that perpetual tolling is "literally impossible" *in this case*, because securities claims are subject not only to a two-year statute of limitations but also a five-year statute of repose that cannot be tolled. *See* Resp. Br. 45. But the question presented is whether *American Pipe* tolls *all* limitations periods for follow-on class actions, and statutes of repose afford no protection in the ordinary case because such non-tollable time limits are "relatively rare." *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 397 (2d Cir. 2016). Adopting respondents' rule would mean that most time limits in the U.S. Code would be subject to indefinite tolling for repeated class actions. That result cannot be reconciled with Congress's decision to enact a statute of limitations in the first place.

b. Respondents also cite *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), which held that preclusion does not apply to absent class members. In response to the worry that this would allow absent class members to later bring similar claims, the Court observed that "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.* at 317. Respondents cite this passage as proof that the Court "already considered and unanimously dismissed petitioner's policy concerns." Resp. Br. 40.

Not so. The problem with the Ninth Circuit's rule is not that similar litigation can be brought by different plaintiffs. The problem is that plaintiffs can press new class actions past the time that Congress judged appropriate. And as this Court recently explained, "[t]he enactment of a statute of limitations" itself reflects a congressional determination that the best solution to repetitive, out-of-time filings is a "generally hard and fast [legal] rule rather than the sort of case-specific judicial determination" required (for example) by the doctrine of comity. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). Respondents strangely suggest that statutes of limitations themselves are malleable because they (unlike statutes of repose) are subject to equitable tolling, Resp. Br. 45–46, but this simply ignores this Court's repeated insistence on "strict adherence" to congressionally-prescribed time limits, *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam), subject only to equitable tolling in extraordinary circumstances, Pet. Br. 24–25.

Certainly, the doctrine of comity, on which respondents rely most heavily, is no substitute for a statute of limitations. It is, rather, a "weak" bulwark against abusive class filings, *Smentek v. Dart*, 683 F.3d 373, 388 (7th Cir. 2012), as this case—in which comity did not stop three identical class actions from proceeding—demonstrates. Indeed, one of the cases that respondents cite as "understand[ing] the proper role in comity-based analyses of subsequent class-certification efforts," Resp. Br. 41–42, derides courts' application of comity to class certifi-

cation decisions as "'cryptic'" and "'novel.'" *Ford v. Ford Motor Co.*, 2014 WL 12570925, at *3 (C.D. Cal. Jan. 17, 2014) (quoting *Smentek*, 683 F.3d at 375–76); *see also* 6 Newberg on Class Actions § 18:30 (5th ed. 2017) (noting that courts are "struggling to give meaning to 'principles of comity'" referenced in *Smith*).

Perhaps the only thing weaker than comity, however, is attorney self-restraint, on which respondents also rely. Respondents are right that plaintiffs' counsel are "rational economic actors," Resp. Br. 47, but that is exactly the problem. As this case demonstrates, it *is* rational for plaintiffs' counsel to repeatedly try their hand at class certification, because the costs of filing a copy-cat complaint are low and the value of a certified class is high. *See* Pet. Br. 44, 48; *see also, e.g.*, *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) (noting incentives for plaintiffs' lawyers to "roll the dice as many times as they please"), *overruled by Smith*, 564 U.S. 299. And it is rational for a defendant in these circumstances to settle even a meritless claim, since *in terrorem* settlement pressures are immense even in ordinary class litigation. *See* Pet. Br. 44.

Respondents thus offer no plausible response to the certainty of abusive litigation that would follow if the Ninth Circuit rule were adopted. They do argue that petitioner has failed to provide examples of abusive litigation in circuits that have adopted that rule. But the Ninth Circuit first adopted its rule in this case, and the Sixth Circuit adopted its own rule only three years ago, so one would not yet expect any

such evidence from those courts. The Seventh Circuit, however, extended *American Pipe* to follow-on class actions in 2011, Resp. Br. 46, and that court *has* on several occasions noted the abusive nature of follow-on class actions.[4] Congress enacts statutes of limitations to avoid this precise result.

3. Respondents close with examples of supposedly inequitable results under petitioner's rule. It would not be surprising if applying a limitations statute as written would sometimes result in an inequitable result, since the time bar's purpose is to cut off meritorious claims. Even so, respondents fail to show any substantial inequity.

For example, respondents note that if a court in a PSLRA case chooses a lead plaintiff other than the plaintiff who filed the original complaint, the new plaintiff would be required to file an amended complaint, possibly outside the limitations period. Resp. 48–49. But such an amended complaint would obviously relate back to the original one under Rule 15—no court would dismiss such a complaint as time-barred, which is why respondents do not cite a single court that ever has. And in any event, respondents' hypothetical itself is highly unlikely, because experienced attorneys "can cobble together a complaint . . . within hours or days" of the events that give rise to a

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[4] *See, e.g.*, *Smentek*, 683 F.3d at 377 (affirming grant of class certification after two other district courts had denied certification in materially identical cases, rejecting comity as only a "weak" bar to re-litigation, and noting that twelve more identical suits remained pending); *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 550, 552 (7th Cir. 2012) (noting vexatious nature of "copycat" class action forum shopping).

claim, Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby,"* 61 Vand. L. Rev. 543, 654 n.85 (2008), and lead plaintiffs will ordinarily be selected within a few months of filing, 15 U.S.C. §§ 78u-4(a)(3)(A)(i), (B)(i). In fact, the *Dean* complaint was filed just eight days after the LM Report. Pet. Br. 7.

Respondents also hypothesize a case in which the named plaintiff is dismissed for lack of standing. Resp. Br. 48. But a named plaintiff's standing would be adjudicated at the outset of the litigation, leaving plenty of time for a new class filing within the limitations period. Moreover, to the extent such a risk exists, it would be ameliorated by a rule encouraging other potential class representatives to file class actions early—just as respondents say would be the case under petitioner's rule. And again, several circuits have for decades rejected extending *American Pipe* to follow-on class actions, yet respondents do not cite a single case in which a defect in named-plaintiff standing has resulted in a class action's dismissal as time-barred. Respondents further speculate (again without a single actual example) that defendants will try to "pick off" all the named plaintiffs after the statute of limitations has run by offering individual settlements. But any such strategy would be precluded after class certification, *see* Fed. R. Civ. P. 23(e); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), and is unlikely to prevent courts from reaching the certification question in any event, *see, e.g.*, *Richardson v. Bledsoe*, 829 F.3d 273, 278–86 (3d Cir. 2016) (canvassing case law allowing named plaintiffs subject to pickoff attempts to litigate class

certification, even where motion for class certification had not yet been filed).

Finally, respondents assert that there are "[m]any situations" in which class treatment may be "appropriate" even after class certification has been denied in the first class action. Resp. Br. 51. That might be true, but limitations periods always cut off claims regardless of their merits, so the fact that meritorious claims might not proceed is irrelevant. Respondents simply fail to offer any inequity that could plausibly support ignoring the statute of limitations for follow-on class actions.

### D. *American Pipe* Should at the Very Least Not Apply When the Propriety of Class Treatment Has Been Previously Adjudicated, a Rule That Would Require Reversal Here

1. At the very least, *American Pipe* should not be extended to class actions when, as here, the propriety of classwide adjudication has already been rejected. Respondents' assertion that this fallback argument is "an implicit concession that [petitioner's] main position is overly harsh and inequitable," Resp. Br. 48, is nonsense. Petitioner maintains that this Court should not extend *American Pipe* to follow-on class actions in any circumstance because doing so would violate fundamental principles of equitable tolling and lead to significant adverse consequences. But authorizing tolling for a new class action when class treatment has already been rejected for a class-based reason would simply be perverse.

It is, after all, decidedly unreasonable for a plaintiff to "rely" on the class mechanism to protect her rights where a court has already ruled that the class mechanism cannot do so. Pet. Br. 55. Serial relitigation of already-decided class certification questions would waste judicial and party resources and is designed to produce inconsistent judgments. Pet. Br. 56. And denying tolling when class treatment has been rejected would not prejudice any individual class member's claim because any such claim would be timely filed under *American Pipe*. Pet. Br. 57.

Respondents' principal response is that even when certification has been denied for a class-based reason, tolling should be allowed to let a new named plaintiff "incorporate [the] court's guidance." Resp. Br. 51. That is a non sequitur. Equitable tolling is not a mechanism for new plaintiffs to learn from old ones' mistakes. No one would argue that equitable tolling is warranted for an individual plaintiff to learn from a court decision rejecting a prior plaintiff's similar individual claim. Respondents fail to proffer a plausible principle of equitable tolling that would lead to a different result in the class action context.

2. Respondents are also wrong that their claims would survive under this fallback rule. *See* Resp. Br. 50–52. The *Dean* court denied certification on predominance grounds because those plaintiffs could not establish a fraud-on-the-market presumption that would obviate the need for individualized showings of reliance. JA192. Respondents now say that the court's predominance-based holding was really a plaintiff-specific rejection of class treatment because

it "was caused by deficiencies in the expert reports submitted by the *Dean* plaintiffs." Resp. Br. 51. But as already explained, Pet. Br. 58, the operative question is whether the class determination was class-based (e.g., predominance or numerosity) or plaintiff-based (e.g., typicality or adequacy of representation), regardless whether the given reason is the named plaintiff's "failure to meet her burden." *Yang*, 392 F.3d at 110. A contrary rule would effectively eviscerate the statute of limitations, since a new plaintiff can always argue that she can do a better job of proving a class-based element like predominance than a previous plaintiff could. Pet. Br. 58–59.

Respondents' contrary argument rests in substantial part on a mischaracterization of the Third Circuit's decision in *Yang*. There, as here, a follow-on class was allowed to proceed where the prior named plaintiff could not prove a fraud-on-the-market theory. 392 F.3d at 108–09. But in *Yang*, the failure of proof was *plaintiff-based*: class certification was denied "solely because [the named plaintiff] was not an appropriate class representative and not because the class itself was deficient under Rule 23." *Id.*

Here, by contrast, the district court specifically found that the *Dean* plaintiffs *did* satisfy the typicality and adequacy requirements, JA184-86, but held that the *Dean* plaintiffs were "unable to establish that questions of law or fact common to class members predominate[d]," JA192. Class certification, in other words, failed for a class-based and not plaintiff-based reason, as the district court itself held. Pet. App. 36a. No equitable principle allows re-

litigation of that question after the statute of limitations has run.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner,*

—v.—

MICHAEL H. RESH, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS


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## INTEREST OF AMICI CURIAE

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age.[1] With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds.

One area where Amici have engaged in vigorous advocacy is urging the robust enforcement of the securities laws through class actions. With the decline of traditional pensions, older Americans are more dependent than ever on the value of stocks in their personal portfolios or 401(k) plans. This case has critical implications in that regard. At issue is whether defrauded investors can bring their claims *in the form of class actions* after the statute of limitations has expired in circumstances where they otherwise could bring "tolled" individual actions under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). AARP as Amicus has previously

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[1] Pursuant to Rule 37.3, counsel for Amici affirm that this brief has been filed with the written consent of the parties, which filed blanket consents with the Court. Pursuant to Rule 37.6, counsel for Amici affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

urged this Court to continue to apply these tolling principles to the securities laws, recognizing the critical importance to AARP members of vigorous class action enforcement in the securities arena. *See, e.g.*, Brief of AARP as *Amicus Curiae* in Support of Petitioner, *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640, 2014 WL 2361885 (U.S. May 28, 2014).

Today, Amici urge the Court to confirm that such permissible claims can be brought in the form offering the most realistic prospect of relief for most individual investors—as class actions. Robust private enforcement of the securities laws through class actions is critical to the financial security of older Americans. Many older adults have no access to advice from financial advisors or fiduciaries and are not in a position to independently evaluate the value or risk of complex securities instruments. Government enforcement, alone, does not guarantee the safety of the financial markets, as evidenced by the massive securities frauds that helped spawn the 2008-2009 financial crisis. The availability of class actions in the circumstances presented in this case is a critical added avenue to ensure adequate relief and market oversight.

As the nation's largest membership organization, AARP has also engaged in extensive advocacy and litigation in other areas, such as consumer protection, employment discrimination, employee benefits, and affordable housing. In all these areas, the availability of class action litigation is often critical to AARP's efforts. The present case is likely to have a significant impact on older adults' access to legal remedies in these areas as well.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Today, Americans of modest means who seek to remedy securities law violations affecting their retirement savings are increasingly on their own. The percentage of Americans whose retirement savings are held in investments managed by pension funds and other large institutional investors has been dwindling for decades.[2] As this Court has often noted, the class action device was made for such claimants; it allows the aggregation of modest claims that would not be feasible if brought individually. *See, e.g., Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). In so doing, "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983).

But as this Court has also noted, class certification turns on a variety of "subtle factors" that engender significant uncertainty. *American Pipe*, 414 U.S. at 553. For that reason, the rules should not require "successful anticipation of the determination of the viability of the class." *Id.* at 553-54. *American Pipe*'s tolling rule protects absent class members not only by allowing them to rely on the named plaintiffs

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[2] Approximately half of Americans now save for retirement using self-directed retirement plans, such as 401(k), 403(b), and other defined contribution and individual retirement accounts, compared to only 25 percent who have savings in defined benefit pension plans. Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2016* 57 (May 2017), https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf.

to protect their rights, but also by enabling them to pursue their claims by other means should those original named plaintiffs fail to obtain class certification.

Petitioner asks this Court to significantly limit this protection by permitting members of a class to pursue only *individual* claims following an initial denial of class certification. This limit would apply, under Petitioner's rule, regardless of the reason the initial action did not achieve class treatment—even if that reason provided little reason to think that other plaintiffs could not successfully secure class treatment. This new limit would be both bad for the courts and bad for plaintiffs. It would be bad for the courts because, in order to protect their own ability to proceed in a class action, absent class members would be forced to undertake their own protective class filings within the limitations period as a hedge against denial of the named plaintiffs' class motion. And it would be bad for plaintiffs—especially plaintiffs of modest means—because if they failed to protect themselves in this way they would be left with individual claims that would generally be infeasible to litigate separately. The only entities that would continue to benefit from *American Pipe*'s tolling rule would be those parties—chiefly pension funds, large corporations, or wealthy individuals—with large enough claims and resources to go forward on their own.

This brief primarily addresses Petitioner's argument that *American Pipe* tolling is not only equitable in its origin but also bounded by the narrower doctrine of equitable tolling in cases like *Menominee Indian Tribe of Wisconsin v. United*

*States*, 136 S. Ct. 750 (2016). That narrower doctrine emphasizes the plaintiff's diligence rather than the broader policies of fairness and judicial economy furthered by Federal Rule of Civil Procedure 23. But neither the equitable tolling cases Petitioner relies upon nor, more importantly, *American Pipe* or *Crown, Cork*, support Petitioner's argument. The latter cases framed a tolling doctrine that, while grounded in the courts' equitable discretion, took account of a broader set of values associated with the class action rule. As such, *American Pipe* is a close family relation of other prudential doctrines that further systemic values, such as aspects of the justiciability doctrine or the equitable abstention rules.

In any event, *American Pipe* necessarily stands for the proposition that an absent class member who relies on a filed class action has exercised all the diligence that is required, up until the point that class certification is denied. It makes no sense to say, at that point, that it is less "diligent" for that absent class member to file a new class action claim than an individual claim. Moreover, Petitioner's distinction would create the same incentives for protective filings that *American Pipe* and *Crown, Cork* sought to prevent. Any absent class member whose claims could not feasibly be litigated on an individual basis would be forced to file protective class claims within the limitations period, thereby undermining Rule 23's judicial economy goals even more greatly than the protective individual claims that worried this Court in its earlier decisions.

Consequential concerns cut strongly against Petitioner's argument here. The risk that defendants will face an infinite regress of follow-on class actions is negligible for two reasons. First, the applicable statute of repose cuts off that risk in the present context and under many other statutory regimes with a similar limitations structure. Second, as this Court stated in a related context, judicial comity can safeguard against re-litigation of class certification issues. *See Smith v. Bayer Corp.*, 564 U.S. 299, 317 (2011). More broadly, Petitioner's rule against tolling for non-class claims would radically tilt the playing field of private enforcement of federal law in favor of large players, such as pension funds and corporations, that have the incentives and wherewithal to litigate their claims individually. This would significantly jeopardize the rights of persons of modest means, including many of the older persons whom Amici represent. And it would turn the policies of the class action rule that *American Pipe* sought to further on their head.

## ARGUMENT

### I. TOLLING UNDER *AMERICAN PIPE* IS NOT CONSTRAINED BY THE PLAINTIFF'S DILIGENCE.

This Court held in *American Pipe* that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Petitioner insists that *American Pipe*'s tolling rule is not only grounded in the courts'

equitable discretion but *limited* by a traditional doctrine of equitable tolling that places a primary focus on the plaintiff's diligence (or lack thereof). *See* Pet. Br. at 18 (asserting that "[p]laintiff diligence has always been an absolute prerequisite for equitable tolling"). There is no doubt that *American Pipe*'s tolling rule is equitable in a broad sense, but that is quite different than saying it is limited by the specific doctrine of "equitable tolling" focused on plaintiff diligence. The cases that Petitioner relies upon for this proposition hold no such thing.

To the contrary, systemic concerns about judicial economy and class action policy under Rule 23 drive *American Pipe*'s tolling rule. That is the consistent thrust of this Court's cases that actually construe and apply the rule. Nor is this mix of equitable flexibility and systemic prudence at all unusual. This Court's doctrines of prudential justiciability and equitable abstention likewise rely on the flexibility afforded by equity to pursue systemic values.

Even if the plaintiff's diligence were a prerequisite to tolling under *American Pipe*, that would not support Petitioner's request for a categorical rule precluding plaintiffs benefiting from tolling from filing class rather than individual claims. Moreover, *American Pipe* itself makes clear that so long as a party falls within a pending class action, diligence requires no further action; hence, Respondents and the absent class members here were diligent in the only way *American Pipe* requires. Petitioner has offered no explanation why "diligence" turns on the procedural vehicle—an

intervention or a class action—chosen by a party when she ultimately does file a claim.

Finally, the only "extraordinary circumstances" that this Court has ever required under *American Pipe* is that refusal to toll a party's claims would undermine the judicial economy that Rule 23 seeks to promote. That is plainly true here. If tolling turns on the procedural vehicle that a party chooses down the line, then class members worried that the initial named plaintiffs may fail to obtain class certification will be forced to make protective class filings of their own. That result would be even worse for judicial economy than the protective *individual* filings that concerned the Court in *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

### A. *American Pipe* tolling is equitable in nature but distinct from traditional equitable tolling rules focusing on the plaintiff's diligence.

This Court has referred to *American Pipe* as a form of equitable tolling on a number of occasions. *See, e.g., Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990). Neither *Young* nor *Irwin*, however, purported to apply or construe *American Pipe*'s tolling doctrine. Critically, neither came close to suggesting that *American Pipe*'s tolling rule is *limited* by traditional tolling doctrine's emphasis on the plaintiff's diligence.

Petitioner relies heavily on *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016)—citing it seven times, including for the basic

statement of "established equitable principles" that "authorize tolling only when the plaintiff 'has been pursuing his rights diligently' *and* when tolling is otherwise justified by 'extraordinary circumstances.'" Pet. Br. at 25-26 (quoting *Menominee*, 136 S. Ct. at 755) (emphasis in original). But *Menominee* actually cuts the other way. In that case, the Menominee Tribe sought "to preserve contract claims not timely presented to a federal contracting officer." 136 S. Ct. at 753. It relied on two distinct tolling theories: "class action" tolling under *American Pipe* and "equitable" tolling under *Holland v. Florida*, 560 U.S. 631 (2010).[3] The district court rejected both theories, and the District of Columbia Circuit agreed with respect to class action tolling under *American Pipe*, finding that the Tribe would have been ineligible to participate in the relevant class action at the time that class certification was denied. *See Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 527 (D.C. Cir. 2010). But the Court of Appeals reversed the district court's holding that the statutory limitations period forbade equitable tolling and remanded to determine the Tribe's eligibility for tolling on that theory. *That* issue is the one that, following remand, ultimately reached this Court in *Menominee*. *See* 136 S. Ct. at 753. The diligence-

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[3] *Holland* is a good example of when plaintiff diligence *is* central to the tolling analysis. In that case, a Florida prisoner sentenced to die for capital murder filed a *pro se* federal habeas corpus petition five weeks late under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d). The Court held that AEDPA's limitations period was subject to equitable tolling and that the petitioner had diligently urged his court-appointed attorney to file the petition on time. *See Holland*, 560 U.S. at 645-49, 653.

based criteria for which Petitioner cites *Menominee* describe an equitable doctrine that the Court explicitly distinguished from *American Pipe*. *See id.* at 754-55; *see also id.* at 755 (making clear that the diligence plus extraordinary circumstances criteria apply under *Holland*'s doctrine of equitable tolling).[4]

The best case for Petitioner is this Court's decision last term in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017). *ANZ* held that the 3-year repose period for claims brought under the Securities Act of 1933 was *not* subject to tolling under *American Pipe*. In order to reach that result, the majority needed to decide whether *American Pipe*'s tolling rule was fundamentally statutory or equitable in origin.[5] But the Court's inquiry was focused on the *nature* of the class action tolling rule; it did not purport to explore *American Pipe*'s requirements or scope. Most critically, *ANZ* recognized that *American Pipe* did not track the usual criteria for equitable tolling. Justice Kennedy's majority opinion acknowledged that "the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner." 137 S. Ct. at 2052. In particular, this Court

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[4] Similarly, this Court discussed *American Pipe* and equitable tolling as distinct doctrines just last month in *Artis v. District of Columbia*, 138 S. Ct. 594, 602 (2018).

[5] This Court reasoned that "[i]f *American Pipe* had itself been grounded in a legislative enactment, perhaps an argument could be made that the enactment expressed a legislative objective to modify the 3-year period [of repose]. If, however, the tolling decision in *American Pipe* derived from equity principles, it cannot alter the unconditional language and purpose of the 3-year statute of repose." *ANZ*, 137 S. Ct. at 2051.

noted that *American Pipe* "did not analyze . . . whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct." *Id.* Although the Court ultimately concluded that "[t]he balance of [*American Pipe*'s] reasoning nonetheless reveals a rule based on traditional equitable powers," *id.*, the Court did *not* say that *American Pipe* tolling is limited by a more specific doctrine of equitable tolling.

*ANZ*'s conclusion that the *American Pipe* rule is equitable in nature is perfectly consistent with the Court's recognition that class action tolling is distinct from the diligence-based equitable tolling in cases like *Holland v. Florida*. If it were true that "courts may not apply equitable tolling rules that 'break with historic principles of equity,'" Pet. Br. at 25 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946)),[6]

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[6] The full quote from *Holmberg* is as follows: "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." 327 U.S. at 395. *Holmberg* is about the importance of adhering to traditional equitable principles when Congress creates an explicitly equitable federal right. *See id.* ("The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity."). It did not involve class actions—an innovative procedure with origins in equity but much altered by contemporary imperatives. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975) (tolling rules must be understood against a broad background of statutory policies, not just traditional equity). To paraphrase *Holmberg*, when Congress approves an elaborate procedure for aggregate litigation, it can expect the federal courts to use their

then *American Pipe* would have read much differently and might have come out the other way. But this Court has made clear that the class action tolling rule rests on Rule 23 and the policies arising out of that rule.[7] The *American Pipe* Court said that "[w]e are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554.[8] Likewise, *Crown, Cork*

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equitable discretion to facilitate the underlying policies of the class procedure.

[7] *See, e.g., ANZ*, 137 S. Ct. at 2051 (noting that *American Pipe*'s rule "furthered 'the purposes of litigative efficiency and economy' served by Rule 23") (quoting *American Pipe*, 414 U.S. at 556). This point answers Petitioner's odd suggestion that *American Pipe* would be unconstitutional were it to exceed the traditional scope of equitable tolling. *See* Pet. Br. at 45-46. *American Pipe* rests on Rule 23's policies as well as traditional equitable doctrine. *See American Pipe*, 414 U.S. at 556-59 (holding that the federal courts have power to toll limitations so long as it is "consonant with the legislative scheme"). This Court has long recognized an extensive scope for federal common law rules derived from a variety of federal interests and statutory policies—not simply from the rules of equity. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). Federal courts thus have ample authority to shape *American Pipe* tolling in such a way as to facilitate the federal policies embodied in Rule 23.

[8] *See also American Pipe*, 414 U.S. at 545-52 (discussing history and policies of Rule 23); *id.* at 553 ("A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive

discussed policies associated with Rule 23 nearly exclusively, without any consideration of the individual equities of the case. *See* 462 U.S. at 350-51. Other cases invoking *American Pipe* similarly have relied heavily on Rule 23.[9] Petitioner thus acknowledges—as it must—that "[t]olling was justified for individual claims [in *American Pipe*] because a contrary rule would undermine Rule 23 by inviting protective individual litigation while a class action was still pending." Pet. Br. at 19-20.

### B. *American Pipe*'s focus on concerns of judicial economy and effective aggregate litigation is consistent with other prudential and equity-based doctrines protecting systemic values.

There is nothing unusual or untoward about a doctrine—like *American Pipe*—that uses equitable flexibility to protect systemic values. Two prominent examples are this Court's prudential tests for justiciability, which are directed in substantial part toward protecting the federal courts' ability to adjudicate claims, and its abstention doctrines, which protect systemic values of comity and

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Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.").

[9] *See, e.g., Chardon v. Fumero Soto*, 462 U.S. 650, 661 (1983) ("*American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class action procedure."); *Johnson*, 421 U.S. at 466 n.12 ("In the light of the history of Fed. Rule Civ. Proc. 23 and the purposes of litigatory efficiency served by class actions, we concluded [in *American Pipe*] that the prior [class action] filing had a tolling effect.").

federalism. These doctrines rest significantly on equitable discretion, but their concerns extend well beyond the diligence or hardships of the parties.

The justiciability doctrines dealing with standing, ripeness, mootness, finality, and adversary presentation are grounded in Article III's requirement of a "Case" or "Controversy," but this Court has long recognized that many aspects "express merely prudential considerations that are part of judicial self-government." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These prudential doctrines are often linked to notions of equitable discretion.[10] In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), for example, Justice Harlan grounded his ripeness analysis not in Article III but rather in the fact that "[t]he injunctive and declaratory judgment remedies are discretionary." *Id.* at 148; *see also id.* at 155 (emphasizing that "the declaratory judgment and injunctive remedies [sought by the plaintiff] are equitable in nature"). That analysis was directed in part at the interests and conduct of the parties, *see id.* at 152-54, but also focused on the judicial system's interest in ensuring that questions presented would be "appropriate for judicial resolution," *id.* at 149. Similarly, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court recognized a prudential requirement of "concrete adverseness" that furthers systemic interests in "sharpen[ing] the presentation of issues upon which the court so largely depends for illumination of

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[10] *See, e.g.*, Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 156 (7th ed. 2015).

difficult constitutional questions," *id.* at 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The abstention doctrines are an even clearer example. Those doctrines, by which federal courts defer to state court adjudication in various circumstances, rest explicitly upon the equitable discretion afforded by a plaintiff's request for injunctive relief. *See, e.g., Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (grounding abstention in equitable rule against restraining criminal prosecutions); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (grounding abstention in plaintiff's "appeal to the chancellor," which is "an appeal to the exercise of the sound discretion, which guides the determination of courts of equity") (internal quotation marks and citation omitted); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996) (holding that discretion to dismiss claims altogether pursuant to abstention principles is limited to cases where the plaintiff seeks equitable relief).

These equitable doctrines explicitly rest, however, on systemic as well as party-centered considerations. In *Pullman*, for example, Justice Frankfurter stressed considerations of judicial economy and optimal decision-making similar to those in the justiciability cases, *see* 312 U.S. at 499-500, as well as structural federalism concerns, *see id.* at 501. And in *Younger*, Justice Black famously employed his equitable discretion to further values of "comity" and "federalism." 401 U.S. at 44-45.

These examples demonstrate that the scope of concerns furthered by equitable flexibility is considerably broader than the compass that

Petitioner would give them. This Court's standard for injunctive relief has long included not only considerations relevant to the particular parties' diligence and interests but also the *public* interest. *See Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) ("In assessing the lower courts' exercise of equitable discretion, we bring to bear an equitable judgment of our own. . . . Before issuing a stay, it is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large."). In the travel ban case, for example, this Court relied on a systemic interest in national security in granting the Government's stay application in part. *See id.* at 2088 ("The interest in preserving national security is an urgent objective of the highest order."). Likewise, the concerns for preserving the integrity of judicial decision-making in the justiciability cases and for comity and federalism in the abstention cases are valid components of the public interest in any equitable calculus.

Much the same is true of *American Pipe*'s concerns for judicial economy and preserving the integrity of the class action procedure under Rule 23. *American Pipe*'s roots in equitable discretion does not mean that systemic concerns must give way to a dispositive focus on the plaintiff's diligence. Equitable principles have never been so limited in their concerns. But even if they had been, Professor David Shapiro rightly observed some years ago that "[t]he scope of [equitable] discretion should not be ruled by tradition alone; rather it should be informed by experience but remain sensitive to current needs

and problems." David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 580 (1985).

### C. Parties in the posture of Respondents here have exercised diligence in the only sense that matters.

Petitioner asserts that "absent class members who do not file their own claims once the class fails and instead continue to remain absent obviously have not exercised any diligence at all." Pet. Br. at 18. Yet this is not at all obvious. To begin, there is a basic disconnect between the categorical rule that Petitioner seeks—that absent class members wishing to file class claims may *never* benefit from tolling—and the case-by-case equitable discretion that Petitioner's theory of diligence-based tolling demands.[11] In any event, as Petitioner necessarily acknowledges, *American Pipe* itself rests on the proposition that absent class members are sufficiently diligent if they rely on the filing of a class action to protect their rights.

The basic fallacy in Petitioner's argument lies in conflating three questions: (1) *when* diligence requires a party to take some action; (2) *what* action diligence requires that party to take; and (3) *who* may benefit from the tolling rule. *American Pipe*

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[11] *See, e.g., Holland*, 560 U.S. at 650 ("In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.") (internal quotation marks and citations omitted).

concerned the first question, and it held that absent class members need take no action while a class claim is pending. With respect to the second question, *American Pipe* said it was sufficient to intervene in an action that had been filed within the limitations period. *Crown, Cork* then held that it would also be sufficient for absent class members to file an individual action of their own. The present case concerns whether those absent class members could also file their own class actions. But *American Pipe* necessarily settled the third question as well: Its tolling rule applies to all absent class members in the initial class action.

Distinguishing between these three questions—the "when," the "what," and the "who"—renders Petitioner's error apparent. Petitioner insists that "the effect of extending *American Pipe* to follow-on class actions is to toll the limitations period for every absent class member, none of whom has done anything to assert her own rights once the first class action failed nor otherwise showed any interest in the litigation." Pet. Br. at 18-19. This objection seeks to limit *who* can take advantage of *American Pipe*'s tolling rule. But *American Pipe* made clear that its rule applied to every absent class member.[12] All that is left to argue—and the only appropriate focus of this appeal—is *what* an absent class member must do to assert her own rights once the first class action fails.

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[12] *See American Pipe*, 414 U.S. at 554 (stating that a timely class action "suspends the applicable statute of limitations as to *all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action") (emphasis added).

Once we focus on this point, however, Petitioner's argument makes little sense. *American Pipe* makes clear that no absent class member is required to do anything while a class action is pending; the limitations period is tolled during that period. As *Crown, Cork* said, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights." 462 U.S. at 352. Petitioner's claim is thus that although filing an *individual* claim once class certification is denied would be "diligent," filing a new *class* claim is not. It is hard to see why this would possibly be true.

Petitioner's argument derives some intuitive appeal from the happenstance that this case involves *three* successive class actions, not two. When the first class action—the *Dean* action—failed, Respondents filed no lawsuit of their own; rather, they relied (or were entitled, in Respondents' view, to rely) on the filing of the *Smyth* action. Only when that action, too, failed did Respondents file their own class claims.

While that may seem like a lot of inactivity, Petitioner's position is not limited to these unusual circumstances. Petitioner's position would have barred the *Smyth* class action, too, had *Smyth* been filed outside the 2-year limitations period. Petitioner insists that *American Pipe* tolling simply does not apply to class claims. Pet. Br. at 24.[13] The *Smyth* plaintiffs, in other words, would have been able to

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[13] As a fallback position, Petitioner suggests that "tolling should not be available when (as here) the viability of the class has already been litigated and rejected." Pet. Br. at 23. That position would have barred the *Smyth* claims as well.

file only individual claims if the *Dean* plaintiffs had been denied class certification more than two years into the lawsuit. But this conclusion would have nothing to do with whether or not the *Smyth* plaintiffs were diligent—it is no less diligent to file a class claim and an individual claim.[14] And as *American Pipe* makes clear, all diligence required of the *Smyth* plaintiffs at the outset of the case was to rely on the *Dean* class action.

The relevant question is not whether Respondents were required to do *something* at the point that class certification was denied in the *Dean* case, but rather *what* Respondents were required to do. And the answer is the same under *American Pipe*: As long as a class action is pending, absent class members may rely upon it until class certification is denied, at which time the clock begins to run again. Critically, Petitioner does not dispute that the *Resh* class plaintiffs were entitled to rely on the *Dean* and *Smyth* class actions. Petitioner's oft-repeated point that this is the *third* class action in the sequence, *see*,

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[14] Perhaps Petitioner would answer that if one wishes to file a class claim, the *only* diligent course is to file one's own class claim within the un-tolled limitations period. That conclusion would turn every statute of limitations into a statute of repose for purposes of class actions. As a restriction *only* for class actions, Petitioner's position would conflict with this Court's ruling in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010), that "[a] class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. . . . [I]t leaves the parties' legal rights and duties intact and the rules of decision unchanged." Moreover, it would be exceptionally hard to ground any such rule in traditional notions of equitable tolling, which do not differentiate between individual and aggregate claims.

*e.g.*, Pet. Br. at 48, is thus entirely rhetorical. Petitioner has already conceded that it was no less "diligent" for Respondents to rely on the *Smyth* class action than on the *Dean* class action. And even if there *were* some reason to distinguish the two, Petitioner's proffered rule—that *American Pipe* tolls the clock only for individual claims, not class claims—would be too inflexible to take it into account. The sole question before the Court is whether an absent class member who has reasonably relied on a pending class action may, if that original class action fails, file her own class action instead of an individual claim.

Nor does the Private Securities Litigation Reform Act of 1995 (PSLRA) establish that Respondents were not diligent. Petitioner asserts that, because the PSLRA encourages all class members to come forward early in the litigation if they wish to be considered as lead plaintiffs, class members who do not do so are barred from bringing a subsequent class action for lack of diligence. *See* Pet. Br. at 19. That reads far more into the PSLRA's lead plaintiff provisions than they say. The PSLRA seeks to facilitate the litigation of the current class action; it hardly seeks to govern who can be a lead plaintiff in a subsequent action involving an overlapping class. The facts of this case illustrate the point. Petitioner does not seem to have argued that the *Smyth* plaintiffs were barred from filing their own class action (within the limitations period) simply because they had not come forward earlier seeking to be lead plaintiffs in the *Dean* class action. Nothing in the PSLRA purports to establish some sort of estoppel principle whereby parties passing up the

opportunity to apply for lead plaintiff status in one case are barred from doing so in the next. If the PSLRA were read to do so, that would likely choke the district courts with protective lead plaintiff filings. It would also likely leave injuries unremedied for individual investors who are most vulnerable to securities fraud—older individuals who must fend for themselves on an individual basis.

### D. Failing to toll limitations for class claims would frustrate the purposes of *American Pipe*.

The same systemic concerns that supported tolling in *American Pipe* and *Crown, Cork* apply to the present case. Those decisions worried chiefly about the burden on the judicial system that would result if tolling were denied.[15] In that scenario, this Court said, absent class members would be forced to file their own claims as a hedge against the possibility that class certification might ultimately be denied. *See American Pipe*, 414 U.S. at 553-54; *Crown, Cork*, 462 U.S. at 350. After all, in many actions the class certification decision does not come until after the limitations period has run.[16] If tolling

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[15] *See American Pipe*, 414 U.S. at 553 (stating that "[a] contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure"); *Crown, Cork*, 462 U.S. at 350-51 (recognizing that "much the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification").

[16] As Justice Ginsburg noted in *ANZ*, "[a] recent study showed . . . that the time from the filing of a securities class complaint to the class-certification decision exceeds two years in 66% of cases

were unavailable, then absent class members would have strong incentives to file their own claims as a protective measure. This wave of protective filings would reverse the judicial economy benefits that the class action procedure is meant to achieve. *See Crown, Cork*, 462 U.S. at 351.

Petitioner's position here risks abandoning the benefits of *American Pipe*'s tolling rule by reviving absent class members' incentive to file their own claims. If tolling were unavailable for class claims, class members would still need to file their own protective claims if they wish to proceed as a class. Class certification is often both relatively uncertain and hotly contested, and absent class members who wish to proceed as part of a class actions would have to be very confident indeed that the initial named plaintiffs would succeed at certification in order to forego filing their own class claims.

Protective class filings are especially likely because many claims can *only* be brought as class claims. Where individual recoveries are likely to be small, plaintiffs will have little ability to attract legal counsel and sue on their own behalf. Hence, if Petitioner prevails here, one of two things will happen. One possibility is that a rule tolling only individual claims would simply undermine the enforcement of federal law in areas where small

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and exceeds three years in 36% of cases." 137 S. Ct. at 2057 n.2 (Ginsburg, J., dissenting) (citing S. Boettrich & S. Starykh, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, p. 23 (2017), available at http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf (as last visited June 19, 2017)).

individual claims are common. And even where there *are* large stakeholders—such as the California pension system in *ANZ*—with incentives and wherewithal to bring individual claims, Petitioner's tolling limit will create troubling inequalities in federal law enforcement. Large stakeholders with substantial resources will remain able to enforce their rights if an initial attempt at class certification fails, but smaller players will be left out in the cold.

The other possibility is that absent class members who could not plausibly file individual claims will simply file protective class claims to protect their right to proceed under Rule 23. There is reason to believe, however, that duplicative class claims are worse for the judicial system than duplicative individual claims. According to Petitioner, for example, class filings uniquely "require costly discovery" and "put[] tremendous pressure on defendants to settle even meritless claims." Pet. Br. at 20, 21. Whether or not those concerns are exaggerated in general, there is little doubt that, as compared to individual claims, protective *class* filings are even more likely to "gum up the works of class litigation." *ANZ*, 137 S. Ct. at 2058 (Ginsburg, J., dissenting).

## II. THE RISK THAT TOLLING CLASS CLAIMS WILL LEAD TO ENDLESS FOLLOW-ON CLASS ACTIONS IS OVERSTATED.

Petitioner's primary argument for limiting *American Pipe* and *Crown, Cork* is grounded not in the logic of those decisions but in unvarnished considerations of policy. This Court should restrict class action tolling, they say, in order to prevent an

infinite regress of follow-on class actions. This risk is nonexistent, however, in the securities context of the present case. And were this Court to consider their other argument in other contexts not presented here, there are ample means to prevent the abuse of follow-on suits.

### A. The applicable statute of repose prevents proliferation of follow-on class actions.

The short answer to Petitioner's concern about follow-on claims is that it is not properly before the Court, because the statutes of repose in the securities laws prevent proliferation of such claims. Petitioner is correct that "Congress has already chosen its preferred method of precluding repeated litigation of the same claim—i.e., by enacting a strict time limit that can only be extended in the rarest of circumstances." Pet. Br. at 4. But that limit is the period of *repose*, not the limitations period.

As this Court noted in *ANZ*, Section 13 of the Securities Act of 1933 contains both a 1-year statute of limitations and a 3-year statute of repose. *See* 15 U.S.C. § 77m. The limitations period runs from the discovery of a securities violation, while the repose period runs from the offering of the security. As Justice Kennedy explained, "[t]he two periods work together: The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." *ANZ*, 137 S. Ct. at 2049-50. Critically, *ANZ* held that *American Pipe* does *not* toll the repose period. *See id.* at 2055. Respondents' securities fraud claims are similarly subject to a two-tiered time bar: a 2-year statute of

limitations, and a 5-year statute of repose. *See* 28 U.S.C. § 1658(b). The statute of repose period cuts off any indefinite series of follow-on class actions in relatively short order.

Because Respondents' claims are subject to a repose period, Petitioner necessarily invites this Court to fashion a limit on *American Pipe* tolling based on concerns not presented by the current litigation. The Court should decline the invitation. If such a limit is to be fashioned, it should be done in a context that will actually allow the Court to explore the practical considerations actually in play. Whatever the import of Petitioner's policy argument in other statutory contexts, the Court should hold simply that *American Pipe* tolling applies where, as here, a repose statute cuts off the possibility of indefinite follow-on claims.

In any event, the combination of limitations and repose periods present in both the Securities Act and § 1658(b) is hardly an outlier. As Justice Kennedy noted in *ANZ*, "[t]he pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits." 137 S. Ct. at 2049.[17] If *American Pipe*'s application under statutes lacking such a rule causes problems in the future, Congress can add this familiar device to the relevant statutory regime. Or, given the equitable flexibility inherent in *American Pipe*'s rule, this Court would be free to fashion a limit on tolling once circumstances arose that require it.

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[17] *See also Gabelli v. SEC*, 568 U.S. 442, 453 (2013) ("[S]tatutes applying a discovery rule . . . often couple that rule with an absolute provision for repose.").

### B. The appropriate limit to follow-on cases is comity, not an exception to *American Pipe*'s tolling rule.

Even setting aside repose periods applicable to securities claims, federal courts have ample means at their disposal to prevent indefinite follow-on class actions. This Court rejected a similar fear in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), which overturned a federal multi-district litigation court's injunction seeking to prevent a state court from certifying a class involving the same claims upon which the federal court had denied certification. In that case, as here, the defendants raised the spectre that plaintiffs will continue to file an infinite stream of class claims, effectively re-rolling the dice on class certification until they get the result that they seek. The Court unanimously rejected that argument, stating that "we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317.

Comity has several virtues over the Petitioner's rule for resolving concerns about follow-on class filings. First, comity is a flexible doctrine that allows courts to take into account the circumstances of particular cases. As such, it is far more consistent with the equitable roots of *American Pipe* than Petitioner's categorical rule against tolling class claims. Second, comity is a general principle of judicial cooperation and mutual deference, while Petitioner's rule is targeted exclusively at class actions. Hence, comity would avoid the *Shady Grove* problem associated with fashioning a judge-made restriction unique to class actions. Petitioner has provided no reason to believe that comity is an

inadequate tool for preventing abuse of the *American Pipe* rule.

## III. PRESERVING *AMERICAN PIPE* TOLLING FOR CLASS ACTIONS IS NECESSARY IN ORDER TO MAINTAIN FAIRNESS.

Across our legal system—from civil rights to environmental law to antitrust and securities law—our law relies fundamentally on "private attorneys general" to enforce critical aspects of federal law.[18] The class action device has developed as a critical means of ensuring that private enforcement can vindicate these important federal interests. As this Court observed in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980),

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

*Id.* at 339. Hence, one purpose behind the contemporary version of Rule 23 was "to provide a mechanism for allowing the joinder of related

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[18] *See, e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982) (antitrust); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (securities); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (civil rights).

modest-sized claims held by a significant number of people that were economically unviable if obliged to be advanced one by one—what today we call negative-value cases." Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 294 (2014).

This aspect of the class action device is particularly crucial to Amici, as many older individuals are persons of modest means unlikely to have claims large enough to make individual litigation economically feasible. Petitioner's position that *American Pipe* tolling is available only for individual claims would have the effect of substantially disfavoring class litigation. As noted above, class certification is frequently decided after the limitations period has run; tolling is thus crucial for any absent class member who subsequently wishes to pursue his or her claims. Under Petitioner's rule, the failure of the original named plaintiffs to secure class certification would bar any further effort to proceed as a class—even if the initial class certification motion were denied for limited reasons that cast no doubt on the suitability of a subsequent action for class treatment.

This effect would not fall equally on all litigants. Rather, large and well-resourced litigants, such as pension funds, large corporations, or wealthy individuals, might well have the incentive and wherewithal to file individual claims after a class failed to secure certification. But persons of modest means with modest claims—including many of Amici's members—may well be unable to pursue their claims at all in the absence of the class device.

That is why Petitioner is willing to contemplate the proliferation of individual claims against it following an unsuccessful effort to certify the class: Petitioner knows that, by and large, most plaintiffs will be unable to sue individually. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

It is wrong and unrealistic to say, as Petitioner does, that absent class members are not "diligent" if they do not pursue their claims on an individual basis. Persons of modest means typically do not pursue individual claims because they cannot afford to do so on their own, and they cannot attract counsel unless numerous claims can be aggregated in one lawsuit. They thus file class claims instead; that is the only feasible form of diligence available. Nothing in the relevant limitations provisions, Rule 23, or this Court's case law supports the notion that individual filings are "diligent" while class claims are not.

The roots of *American Pipe* tolling in equity provide an ample basis for taking into account the potential unfairness of Petitioner's rule. Both *American Pipe* and *Crown, Cork* emphasized that tolling limitations for absent class members is not unfair to defendants, because the initial class action filing puts them on notice of the claims and parties they confront. *See American Pipe*, 414 U.S. at 554-55; *Crown, Cork*, 462 U.S. at 352-53. But fairness to plaintiffs is relevant, too. This Court should not restrict tolling under *American Pipe* in such a way as to systematically favor large claimants over small

ones. Rather, this Court should preserve the function of class actions in enabling private enforcement of federal law by ensuring that small claimants can continue to bring class claims.

## CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,


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No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner,*

v.

MICHAEL RESH, ET AL.,
*Respondents.*

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

## BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION FOR JUSTICE AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF THE RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

The **American Association for Justice**, formerly known as the Association of Trial Lawyers of America, was established in 1946 to safeguard victims' rights, strengthen the civil-justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. Based on its members' expertise in class action litigation—and its organizational concern for the development of the law in this area—AAJ is well positioned to offer a unique perspective on the questions presented by this case.

The **National Consumer Law Center** is a non-profit research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a recognized expert on consumer issues and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress, state legislatures, agencies, and courts for nearly fifty years. NCLC is the author of a widely praised twenty-volume Consumer Credit and Sales Legal Practice Series, which includes a manual on *Consumer Class Actions* (9th ed. 2016).

## SUMMARY OF ARGUMENT

The petitioner describes this case as an opportunity for the Court to reject makeshift, unprincipled theories of equitable tolling. That framing is correct. But it is the petitioner's argument—not the decision below—that falls flat when tested against the nation's tradition of equity.

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[1] No counsel for a party authored this brief in whole or in part and no person other than the *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

As this Court recently confirmed, tolling under *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), is "based on traditional equitable powers." *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2052 (2017). Accordingly, the very first question that this Court must address is whether any recognized tradition of equity supports the petitioner's account of how *American Pipe* operates here.

Although it pays homage to that requirement, the petitioner's entire argument depends on violating it. An unspoken premise of the petitioner's brief is that equitable tolling can render a claim timely on the condition that the claim not be litigated using certain rules of civil procedure. Put differently, the petitioner believes that people with live claims can be forbidden from using certain claim-processing rules because the timeliness of their claims is the result of equitable tolling.

This account of equitable tolling and the ongoing procedural handicaps that it can supposedly inflict is without foundation. None of the Court's cases describe equity as operating this way, and several cases (including *American Pipe* itself) signal that it cannot do so. The petitioner's efforts to evade this conclusion only lead it to more fundamental errors—including a conflation of substantive claims with the procedures through which they are processed, and a description of equitable tolling that assigns decisive weight to events *after* the tolling period.

There is thus little need to grapple with the mysteries of the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). Regardless of whether the petitioner's conception of *American Pipe* is foreclosed by those authorities, it fails on its own terms as a proper and legitimate account of equitable tolling.

## ARGUMENT

### The petitioner improperly contends that equitable tolling imposes procedural limitations that have no basis in traditions of equity.

The parties' disagreement is a narrow one. They both recognize that *American Pipe* tolling is a valid and appropriate doctrine grounded in the Court's equitable powers. *See* Pet. Br. 2; Resp. Br. 1; *see also ANZ Secs.*, 137 S. Ct. at 2051. They both agree that *American Pipe* protects plaintiffs who have diligently relied on a pending class action to protect their rights, and that tolling is justified by the extraordinary need to avoid a direct conflict with the central purposes of Rule 23. *See* Pet. Br. 30; Resp. Br. 39; *see also American Pipe*, 414 U.S. at 552–55. Finally, both parties acknowledge that by virtue of *American Pipe* tolling, every individual member of the *Resh* class action had a timely claim that it could have asserted when the *Resh* class complaint was filed. *See* Pet. Br. 30-31; Resp. Br. 20; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

At bottom, there is just one dispute here: whether individuals with live claims are foreclosed from availing themselves of Rule 23's procedural mechanism because the timeliness of their claims is the result of equitable tolling. According to the petitioner, if a claim is rendered timely by virtue of *American Pipe* equitable tolling, it *can* be asserted in federal court, but equity nevertheless forbids the plaintiff from using one particular rule of civil procedure that would otherwise apply.

As the respondents explain, even if the petitioner's account of *American Pipe* were defensible on its own terms, this asserted limitation would still have to be rejected under *Shady Grove*, 559 U.S. at 393. *See* Resp. Br. 21-23. There, the Court made clear that Rule 23

"unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met." *Id.* at 406 (emphasis in original). Thus, courts may not impose additional, atextual requirements for use of the class action procedure. *See* Pet. App. 17a (explaining that Rule 23 cannot "be set aside when a suit's timeliness depends on a tolling rule." (citation omitted)).

But there is a simpler and more fundamental flaw in the petitioner's argument. *American Pipe* tolling is a species of equitable tolling. Accordingly, the petitioner's account of *American Pipe* cannot stand unless it is supported by recognized principles and traditions of equity. Can the application of an equitable-tolling rule strip away a claim-holders' ability to use certain rules of civil procedure in litigating her claim? If not, the petitioner's argument fails at the very first step—and it is unnecessary to ask whether *American Pipe* tolling can supplement Rule 23's criteria under *Shady Grove*.

As this brief explains, equity does not stretch so far. Ironically, while the petitioner stakes its case on arguments against expanding equitable tolling, that is just what it would have this Court do. Indeed, the expansion that it proposes is far more radical than the straightforward application of *American Pipe* approved by the court below. To our knowledge, this Court has never held that equitable tolling can function to preserve a claim's timeliness, but only on the condition that the plaintiff not make use of specific rules of civil procedure (or other claim-processing rules) when he files his claim. While *American Pipe* "did not consider the criteria of the formal doctrine of equitable tolling in any direct manner," that is no basis for tossing aside settled principles

of equity or manufacturing new ones in assessing how to apply *American Pipe*. *ANZ Secs.*, 137 S. Ct. at 2052.

Because the petitioner asks equity to do something that equity cannot do—preserve a claim only on the condition that specified rules of civil procedure be rendered unavailable—its argument collapses right out of the gate and must be rejected.

**A. Equitable tolling is not an unregulated power.**

Although the Judiciary's equitable powers are broad, they are not unbounded. As this Court has emphasized time and again, "courts of equity 'must be governed by rules and precedents no less than the courts of law.'" *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

That principle applies with full force to equitable tolling. *See Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (observing that equitable tolling is not "an unregulated power of administering abstract justice at the expense of well-settled principles"). The judicial power to equitably toll statutes of limitations is justified only by "the presumption that Congress legislates against a background of common-law adjudicatory principles." *ANZ Secs.*, 137 S. Ct. at 2051 (quotation marks and citations omitted). On this basis, courts have held that a wide array of statutory limitations periods are subject to equitable tolling. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158 (2013) (collecting cases); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990).

These decisions, however, have emphasized that Congress "can hardly expect [courts] to break with historic principles of equity." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). The Court has therefore rejected requests to invent rules that are "divorced from long-settled equitable-tolling principles." *Credit Suisse Sec.*

*(USA) LLC v. Simmonds*, 566 U.S. 221, 226 (2012). As the Court has recognized, fashioning a new kind of tolling rule without a solid foundation in traditions of equity would raise substantial separation-of-powers concerns. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017).

### B. *American Pipe* itself does not justify the petitioner's asserted limits on equitable tolling.

Notwithstanding its own criticism of unmoored equitable doctrines, the petitioner makes virtually no effort to explain how its proposed rule is consistent with—much less required by—traditional equitable principles. At no point does the petitioner cite any case for the key proposition that it must establish to prevail: that equitable tolling can render a plaintiff's claim timely, but only on the condition that she not later available herself of a particular, otherwise-applicable rule of civil procedure.

The sole authority that the petitioner invokes for this claim is *American Pipe* itself. *See* Pet. Br. 28-30. The petitioner imputes to *American Pipe* (and to *Crown, Cork*) a novel theory of equitable tolling—one that preserves claims while imposing post-tolling constraints on which rules of civil procedure may be invoked while litigating them.

That is not a tenable reading of precedent. Neither *American Pipe* nor *Crown, Cork* announced an entirely new species of equitable tolling. In fact, both cases use expansive language that is directly at odds with the procedural limitation fabricated by the petitioner.

First, *American Pipe* held without qualification that its tolling rule covers "*all* asserted members of the class." 414 U.S. at 554 (emphasis added). In applying *American Pipe* beyond the specific context of motions to

intervene after the denial of class certification, *Crown, Cork* echoed its broad reasoning and emphasized "that the holding of that case is not to be read so narrowly." 462 U.S. at 350; *see also id.* at 353–54 ("Once the statute of limitations has been tolled, it remains tolled for *all* members of the putative class until class certification is denied." (emphasis added)). Since then, this Court has repeatedly described *American Pipe* tolling as applying to *all* members of a putative class—and has never suggested that *American Pipe* is inapplicable to members who later choose to aggregate their individual claims. *See ANZ Secs.*, 137 S. Ct. at 2051; *Credit Suisse*, 566 U.S. at 226 n.6; *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974). Thus, neither *American Pipe* nor *Crown, Cork* supports the notion that claims rendered timely by equitable tolling are uniquely barred from being processed under certain rules of civil procedure.

Second, rather than embrace such limits, *Crown, Cork* emphatically rejected any added procedural straightjackets for claims rendered timely by *American Pipe*. *See* 462 U.S. at 351–54. In describing how it expected tolling would operate, the Court explained that class members with claims preserved by *American Pipe* "may choose to file their own suit" instead of intervening in the original litigation. *Id.* at 354. The Court did not identify any limitations that would follow (and restrict) class members in filing "their own suit." Nor did it suggest that they could not use any rule of procedure governing aggregation of claims. Consistent with this conception of *American Pipe*, the Court has applied it in a diverse range of procedural settings. *See* Resp. Br. 30 (discussing *American Pipe*, 414 U.S. at 461; *Eisen*, 417 U.S. at 176 n.13; *United Airlines, Inc. v. McDonald*, 432

U.S. 385, 391 (1977); *Crown, Cork*, 462 U.S. at 354; and *Chardon v. Fumero Soto*, 462 U.S. 650, 654 (1983)).

Finally, as the Court recently observed, *American Pipe* "relied on cases that are paradigm applications of equitable tolling principles." *ANZ Secs.*, 137 S. Ct. at 2052. These cases included *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959), and *Holmberg*, 327 U.S. 392. *American Pipe* thereby justified its tolling rule by reference to traditions of equity that are "older than the country itself." *Glus*, 359 U.S. at 234. Given *American Pipe*'s deliberate reliance on canonical equitable-tolling cases, there is no reason to accept the petitioner's claim that the *American Pipe* Court saw itself as fashioning entirely new principles of equity. If anything, the opposite is true: the Court based its rule "on traditional equitable powers" that are "deeply rooted in our jurisprudence." *ANZ Secs.*, 137 S. Ct. at 2052.

In sum, whereas the petitioner imputes its novel theory of equitable tolling to *American Pipe*, that case is more faithfully read as adhering to inherited rules of Anglo-American equity jurisprudence. And those traditional rules do not support the petitioner's contention that claims rendered timely by equitable tolling are properly subject to ongoing procedural restrictions.

### C. No other traditional principle of law or equity supports the petitioner's proposed limitation on claims rendered timely by *American Pipe*.

Apart from *American Pipe* and *Crown, Cork*, the petitioner does not even purport to identify any case or principle in this Court's jurisprudence that substantiates its account of equitable tolling. Nor could it. There is no such thing as equitable tolling on a condition subsequent, where the relevant condition involves the availability of a

claim-processing rule. *See Shady Grove*, 559 U.S. at 408 ("A class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."). The absence of judicial authority for this theory is sufficient proof that it lacks any foundation in traditional equitable principles. *See Holland*, 560 U.S. at 651 ("[G]iven the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments.").

Indeed, judicial authorities point the other way. In a series of recent decisions, this Court has identified two—and only two—"elements" of equitable tolling: diligence and extraordinary circumstances. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016) (citation omitted). Further, the Court has emphasized that these elements are central to the doctrine, "not merely factors of indeterminate or commensurable weight." *Id.*[2] Equitable-tolling precedent thus offers no foundation for a third element restricting the procedural rules that a plaintiff can use in alleging his claim.

If such an element did exist, it is unclear what limitations might apply. Would *American Pipe* forbid tolling when a plaintiff invoked other "rules allowing multiple claims . . . to be litigated together," such as Rule 18 (joinder of claims), Rule 20 (joinder of parties), and Rule 42(a) (consolidation of actions)? *Shady Grove*, 559 U.S. at 408. Or does the petitioner believe that plaintiffs with claims preserved by *American Pipe* are denied only the prerogative to use a single rule of civil procedure—

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[2] As the parties acknowledge, *see* Pet Br. 2; Resp Br. 1, and as the Court has explained, *see ANZ Secs.*, 137 S. Ct. at 2051–52, these requirements are both fully satisfied with respect to applications of *American Pipe* tolling.

namely, Rule 23? In making these determinations about whether and how to aggregate claims, what equitable principles would the petitioner have the Court invoke? What precedents would guide the determination? And does this rule apply elsewhere? Are there any circumstances other than class actions where a claim rendered timely by equitable tolling may be pursued, but only if the plaintiff does not use certain rules of civil procedure?

The petitioner offers no answers to these questions. Nor does it identify any limiting principle. That is because the petitioner has asked the Court to use its equitable power in ways divorced from traditional principles of equity. For this reason alone, the petitioner's account of the limits imposed by *American Pipe* cannot be accepted.

### D. The petitioner's argument depends on faulty premises about how equitable tolling works.

Ultimately, the petitioner offers an adventurous and far-reaching account of equitable tolling under *American Pipe*: not only does it preserve the timeliness of claims, but it also scrubs away claim-holders' ability to avail themselves of certain procedural rules in any resulting litigation. Described this way, the petitioner's argument is plainly out of key with traditions of equitable tolling.

Accordingly, the petitioner works hard to re-describe its argument. In the petitioner's telling, the only question here is whether the underlying rationale for *American Pipe* properly applies to subsequent class actions, as compared to subsequent individual actions. This framing of the issue, however, depends on two key premises—neither of which withstands careful scrutiny.

### *1. The petitioner's account of equitable tolling conflates substance and procedure.*

The petitioner's first error is to presume that there is some kind of metaphysical distinction between "class actions" and "individual actions," such that equitable tolling can save one kind of action but not the other for the *exact same* substantive claim. *See, e.g.*, Pet. Br. 28-29, 31, 33-37. This presumption animates the petitioner's contention that the Court should engage in separate analyses of whether the policies underlying *American Pipe* apply to individual actions and class actions. But the distinction on which the petitioner builds this argument has no basis in law.

By its terms, and consistent with the Rules Enabling Act, Rule 23 does not create any substantive rights or confer any substantive claims. Instead, Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged," altering only how "claims are processed." *Shady Grove*, 559 U.S. at 408 (plurality opinion); *see also id.* at 447 (Ginsburg, J., dissenting) (observing that "Rule 23 describes a method of enforcing a claim for relief").

Accordingly, when a person has a substantive claim for relief, he does not have both an "individual claim" and a "class claim." Rather, he has a single, unified "claim." And in seeking to vindicate that claim, he may avail himself of many different procedural rules that describe how claims may be processed in federal court. *E.g.*, Rule 3; Rule 18; Rule 20; Rule 23; Rule 24. A "class action" and an "individual action" are merely two possible procedures for litigating his "claim" (or for litigating it alongside other claims aggregated in a single proceeding). *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326,

332 (1980) ("The right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

In that respect, it confuses substance with procedure to suggest that equity can toll an "individual action" but not a "class action" for a single claim. These issues cannot be analyzed separately, as the petitioner would prefer. When a person is injured (or learns of his injury) and a claim accrues, that claim remains timely for a finite period. While equity can extend that period by tolling the limitations clock, this Court has never held that equity might somehow split the substantive claim in half and toll the "individual" part but not the "class" part.

The petitioner thus missteps in contending that *American Pipe* tolling can be analyzed separately for class actions and individual actions seeking relief for the same underlying claim. If *American Pipe* operates to preserve a claim as timely, it necessarily preserves the *whole* claim. The question whether claim-holders can avail themselves of specific procedural rules is a distinct issue. And for the reasons already given, traditional principles of equity foreclose the petitioner's assertion that claims preserved by tolling are subject to continuing procedural restrictions.

### 2. *The petitioner's account of equitable tolling focuses on the wrong point in time.*

The petitioner's argument also depends on a second, related error: it assigns controlling weight to procedural decisions that a plaintiff makes in filing his claim *after* the tolling period has ended, even though such conduct has never been seen as relevant to the tolling inquiry.

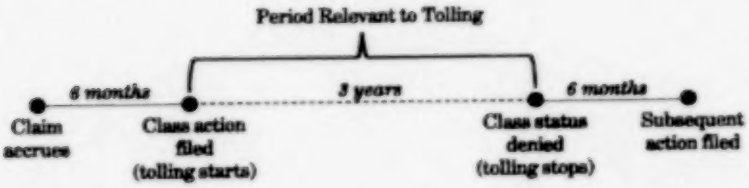
Under *American Pipe*, when a class action is filed within the limitations period, it "suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. As indicated by the Court's use of the present tense in that sentence ("suspends"), the suspension of the tolling period occurs *immediately* upon the filing of the class action. *Id.* at 554. This understanding is confirmed by many other equitable-tolling cases, which have used the present tense to describe "equitable tolling [as] a doctrine that *pauses* the running of, or *tolls*, a statute of limitations." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation omitted) (emphasis added).

Equitable tolling thus operates in real time. *See Artis v. D.C.*, 138 S. Ct. 594, 601–02 (2018) ("Ordinarily, 'tolled' . . . means that the limitations period is suspended (stops running) . . . then starts running again when the tolling period ends, picking up where it left off."). Where a plaintiff is acting diligently but is subjected to extraordinary circumstances, equity keeps the limitations clock frozen in place. *See United States v. Ibarra*, 502 U.S. 1, 4, n.2 (1991) (per curiam). Only after one or both of these elements is no longer satisfied does the clock resume.

The proper orientation of an equitable-tolling analysis is therefore *backward*—not to the plaintiff's procedural decisions in filing his current lawsuit (whose timeliness may depend on tolling), but rather to the earlier point in time at which he allegedly acted with diligence while facing extraordinary circumstances. The key question is whether, at that moment, the plaintiff met the standard for equitable tolling. *See Artis*, 138 S. Ct. at 602. Generally, the plaintiff's conduct *after* the tolling period ended is

of limited or no relevance to the equitable-tolling inquiry. *See Gibbs v. Legrand*, 767 F.3d 879, 892 (9th Cir. 2014).

This point is illustrated by the following diagram, which represents the ordinary operation of *American Pipe* tolling. For purposes of the diagram, it can be presumed that the limitations period is two years:




As this diagram shows, the events relevant to equitable tolling all take place in the historical past, as measured against the moment when the subsequent action is filed. Ordinarily, events after the tolling period concludes thus have no bearing whatsoever on an equitable assessment of whether the clock was stopped in the first place.

Here, however, the petitioner inverts that rule by centering the equitable-tolling inquiry around the moment in time at which the claim is filed. In the petitioner's telling, the most important decision is what procedural rule the plaintiff chooses to invoke when filing his claim *in the present*. *See* Pet. Br. 35–37. On that view, whether a claim receives the benefit of equitable tolling depends entirely on a procedural choice that the plaintiff makes long after the tolling period has concluded.

The petitioner does not identify any other equitable-tolling precedent in which the availability of tolling has depended on procedural decisions later made by the

plaintiff in filing his case, rather than on his conduct in the tolling period. That is because there are no such cases. Here, too, the petitioner advances a rule unmoored from the traditional principles of equitable tolling.

* * * * *

Last Term, this Court clarified that *American Pipe* tolling is fundamentally equitable in character. *See ANZ Secs.*, 137 S. Ct. at 2051. In light of this holding, there can be no doubt that applications of *American Pipe* must be consistent with the traditional equitable principles that Congress presumptively incorporates into statutes of limitations. *See id.* While the petitioner asserts that the court of appeals improperly expanded equitable tolling in the decision below, it is the petitioner that commits this sin. There is no basis in precedent for holding that a plaintiff may benefit from equitable tolling, but not if he decides to avail himself of certain rules of civil procedure in bringing his claim. Imposing that requirement would not only restrict *American Pipe* without a proper basis, but it could also cause broader mischief in the law of equitable tolling. This Court has wisely declined to "break from historic principles of equity," *Holmberg*, 327 U.S. at 395, and it should not accept the petitioner's invitation to do so here.

## CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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No. 17-432

IN THE
# Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner*,

*v.*

MICHAEL RESH, ET AL.,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, RETAIL LITIGATION CENTER, INC., AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including class action matters.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases,

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* Pursuant to this Court's Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no one other than *amici*, their counsel, or their members made a monetary contribution to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3, counsel for *amici curiae* states that counsel for petitioner and respondents have both granted blanket consent to the filing of all *amicus* briefs, and have submitted letters to that effect to the Clerk.

including those brought as class actions. The RLC frequently files *amicus curiae* briefs on behalf of the retail industry.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil-justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

The members and stakeholders of all three *amici* have a keen interest in ensuring that courts evenhandedly enforce the substantive and procedural requirements applicable to class action lawsuits. The class action procedure cannot alter substantive law. The decision below, however, erroneously extends a judicially created tolling doctrine to effectively eliminate congressionally mandated statutes of limitations in a recurring class action scenario. Reversal is warranted.

## SUMMARY OF ARGUMENT

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court held that the filing of a class action automatically suspends, or "tolls," applicable statutes of limitations. Accordingly, "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual* claim or move to intervene in the suit." *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011) (emphasis added).

The majority of circuits have correctly limited *American Pipe* tolling to the period preceding the *first* decision on class certification, rejecting the argument that *successive* class actions can preserve or revive the timeliness of the claims of those former class members who do not come forward after the initial class is rejected. Such "stacked" class actions allow "lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely," simply cycling in new named plaintiffs "until they find a district court judge who is willing to certify the class." *Yang* v. *Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J., concurring in part and dissenting in part).

Two courts of appeals—the Ninth Circuit in the decision below, and the Sixth Circuit in a decision followed by the court below—have recently abandoned the majority "anti-stacking" rule and held that limitations periods applicable to the claims of absent persons can be tolled again, and again, and again—as long as lawyers keep filing putative class actions. *See* Pet. App. 11a-23a; *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015).

*Amici* respectfully submit that the decision below should be reversed for four principal reasons:

**I.** This Court held last Term that the suspension of limitations periods authorized by *American Pipe* is a form of equitable tolling, not a right granted either by statute or Federal Rule of Civil Procedure 23. *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Secs., Inc.*, 137 S. Ct. 2042, 2051 (2017). That holding undercuts the reasoning of the Ninth and Sixth Circuit decisions allowing stacked class actions, both of which were premised on the assumption that *American Pipe* tolling was required by Rule 23 itself. Since that premise has already been rejected by this Court, their conclusion cannot stand.

Moreover, equitable tolling is a "rare remedy" (*Wallace* v. *Kato*, 549 U.S. 384, 396 (2007)), available "only" to plaintiffs who have "been pursuing [their] rights diligently" but have nonetheless been "prevented" from "timely filing" by "some extraordinary circumstance." *Menominee Indian Tribe of Wisc.* v. *United States*, 136 S. Ct. 750, 755 (2016) (quotation omitted). These traditional equitable considerations preclude *expanding* the *American Pipe* tolling doctrine to encompass claims asserted on behalf of persons who fail to step forward individually after the first class action is rejected, as this Court's precedents clearly require them to do.

**II.** *American Pipe* tolling is in considerable tension with the separation-of-powers concerns animating this Court's recent decisions regarding judicial modification of statutory deadlines. As the Court recently explained, courts "are not at liberty to jettison Congress' judgment on the timeliness of suit." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014). It is far from clear where the Court found the authority, in 1974, to adopt a rule suspending statutes of limitations across the board upon the mere

filing of a class action complaint. Even if that rule warrants retention as a matter of *stare decisis*, the Court should not, in 2018, override legislatively enacted timely filing limits for the second, third, or *n*th case filed as a putative class action. The Ninth Circuit (like the Sixth Circuit before it) extended the *American Pipe* doctrine beyond the limits previously given it by this Court, and in so doing those courts invaded the province of the Legislature.

**III.** The Rules Enabling Act, 28 U.S.C. § 2072, prohibits using Rule 23 to "giv[e] plaintiffs . . . different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). *American Pipe* tolling, however, makes stale claims timely precisely *because* of claimants' status as absent members of a previous, failed putative class. Claims that would be untimely if asserted individually are made timely simply because they are asserted in a class action. This contradiction comes into even sharper relief when the doctrine is expanded to resuscitate claims in a successive class action, as happened here and in *Phipps*. The Rules Enabling Act squarely prohibits courts from using procedural rules to affect substantive rights in this fashion.

**IV.** The practical, real-world implications of stacked class actions do not support an extension of *American Pipe* tolling. As the Court recently observed, any supposed benefits from avoiding the need for protective filings by individual class members is "likely . . . overstated." *CalPERS*, 137 S. Ct at 2054. And in any event, no matter how great, such benefits would not provide the courts with "authority to rewrite" statutory deadlines. *Id.* at 2053-54 (quotation omitted). Indeed, stacked class actions burden the

courts and defendants with endless rounds of class-certification briefing, and hamper accurate adjudication by delaying discovery and trial until years and decades beyond the underlying events, when memories and other evidence have long faded. The history of both this case and the Sixth Circuit's *Phipps* case make clear that the same proposed classes will appear over and over again if given the chance. But judicial efficiency is served by finality, not by perpetual litigation.

In summary, an array of intervening precedent makes clear that *American Pipe* would not be decided the same way today. Even if *American Pipe* itself stays on the books, the Court's intervening precedents establish that *expanding* this judicially created tolling doctrine to allow stacked class actions would be incompatible with principles of equity, the Constitution, the Rules Enabling Act, and practical considerations. The decision below should therefore be reversed.

## ARGUMENT

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. Once class certification fails, the clock resumes running, and former putative class members have the remainder of the original limitations period in which "to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 354 (1983). Or, as the Court recently summarized the rule: If certification is rejected, a would-have-been class member must "file an individual claim or move to intervene in the suit" to pursue

that claim. *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011).

The majority of the courts of appeals have long hewed closely to the Court's tolling framework, heeding the warning that the "tolling rule of *American Pipe* is a generous one, inviting abuse." *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring). Specifically, they have held that if a former class member fails to protect his, her, or its individual rights (by filing suit or intervening in a pending action) after certification fails, the limitations period cannot be extended or revived by the filing of another putative class action. *See Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Angles* v. *Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 n.10 (4th Cir. 2012); *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Ewing Indus. Corp.* v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1325 (11th Cir. 2015); *see also Yang* v. *Odom*, 392 F.3d 97, 104 (3d Cir. 2004) (applying bar when certification fails due to defect in class itself); *Great Plains Tr. Co.* v. *Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (same). Because this approach generally precludes successive (or "stacked") class actions, it has become known as the anti-stacking rule.

The Sixth and Ninth Circuits were long in accord with the anti-stacking rule, but recently abandoned their own prior decisions by ruling that a successive class action *again* tolls the claims ostensibly asserted on behalf of absent persons. *See* Pet. App. 21a-22a (third class action); *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-53 (6th Cir. 2015) (second class action). The question presented in this case is whether this invitation to perpetual litigation can be reconciled

with the principles of law and equity that this Court has made clear apply to judicial adjustments of legislatively enacted timely filing requirements.

These two outlier opinions are based largely on over-reading this Court's decisions in *Shady Grove Orthopedic Associates* v. *Allstate Insurance Co.*, 559 U.S. 393 (2010), and *Smith* v. *Bayer*. But neither case supports the perpetual litigation rule for which they have been invoked. *Shady Grove* says nothing at all about tolling, under *American Pipe* or otherwise. *Smith*'s only mention of tolling is in a footnote clearly stating that the *American Pipe* doctrine allows subsequent *individual* actions. *See* 564 U.S. at 313 n.10. The rest of the case addressed whether a decision rejecting certification of a class has preclusive effect on future actions by unnamed class members; it does not (*see id.* at 318), but that has nothing to do with whether such future claims are *timely*.[1]

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[1] The Seventh Circuit confused matters by casting the question in terms of whether an initial rejection of class certification is *binding* on the absent class members in a subsequent class action, rather than focusing on whether the claims of such individuals are *timely*. *See Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563-64 (7th Cir. 2011). That approach did not survive this Court's decision in *Smith* v. *Bayer*, which squarely held that members of a putative class are not bound by a decision rejecting certification. 564 U.S. at 312-13. The Seventh Circuit has, nonetheless, persisted in conflating preclusion and timeliness, holding that a "denial of class certification [does] not bind" members of a putative class "for whom the statute of limitations has not run." *Collins* v. *Vill. of Palatine, Ill.*, 875 F.3d 839, 846 (7th Cir. 2017). The anti-stacking rule has nothing to do with preclusion, and everything to do with tolling. The background principle is that a statute of limitations begins to run when a claim accrues. *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134

In fact, no precedent of this Court even remotely supports the idea of limitless tolling without regard to Congress's judgments in enacting statutes of limitations. On the contrary, numerous precedents of this Court issued in the decades since *American Pipe* make clear that the expansion of the tolling doctrine undertaken by the court below is untenable under the equitable factors in which *American Pipe* tolling is rooted, the Constitution's separation-of-powers requirements, the Rules Enabling Act, and practical considerations. For any or all of these reasons, the judgment below should be reversed.

## I. STACKED CLASS ACTIONS ARE INCOMPATIBLE WITH THE REQUIREMENTS OF EQUITABLE TOLLING

Last Term, the Court made clear that *American Pipe* tolling is "grounded in the traditional equitable powers of the judiciary," rather than "mandated by the text of a statute or federal rule." *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017). "[N]or could it" be otherwise—"Rule 23 does not so much as mention the extension or suspension of statutory time bars." *Ibid.*

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S. Ct. 1962, 1967 (2014). The *American Pipe* doctrine "suspends" the running of statutes of limitations (*American Pipe*, 414 U.S. at 554), but only until the class certification decision has been made. *Id.* at 561. If the class is not certified, then the limitations periods begin running again—as *American Pipe* itself held (*ibid.*), and *Crown Cork* reiterated (462 U.S. at 354). The question in this case is whether the filing of a subsequent class action suspends the limitations period *again*. The answer to that question turns on courts' authority to override legislative determinations regarding timely filing, not on whether any person is precluded or bound by any previous ruling on class certification.

*CalPERS* thus precludes the theory that Rule 23, as interpreted in *Shady Grove*, somehow creates a right to stacked class actions. *See* Pet. App. 17a (asserting that *Shady Grove* "confirmed" the availability of such tolling); *Phipps*, 792 F.3d at 652 (citing *Shady Grove* and holding that disallowing stacked class actions would "eviscerate Rule 23"). To be sure, *Shady Grove* says that Rule 23 governs all cases filed as class actions in federal court. 559 U.S. at 399-400. But any reliance on that proposition to justify stacked class actions did not survive *CalPERS*'s clarification that *American Pipe* tolling is equitable, and not a function of Rule 23. *See* 137 S. Ct. at 2052. Since *American Pipe* tolling is not required by Rule 23, the fact that Rule 23 governs class action procedure in federal cases does not justify the extension of the *American Pipe* tolling doctrine to subsequent class actions.

The reiteration in *CalPERS* that *American Pipe* tolling is equitable also lays bare the tension between the "automatic" tolling initially afforded absent class members and the Court's sharp limits on equitable modification of statutory deadlines. As originally articulated by the Court, *American Pipe* tolling is uncommon, if not unique, among modern equitable tolling doctrines because it applies *automatically* upon the filing of a class action complaint. *See* 414 U.S. at 551 (acknowledging that tolling is available to "those members of the class who did not rely upon the commencement of the class action" and even those "unaware that such a suit existed").

In the decades since *American Pipe* was decided, the Court has reiterated that equitable tolling "is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007). A plaintiff

is "entitled" to its benefit "*only if*" he "'has been pursuing his rights diligently,'" and "'some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe of Wisc.* v. *United States*, 136 S. Ct. 750, 755 (2016) (emphasis added) (quoting *Holland* v. *Florida*, 560 U.S. 631, 649 (2010)); *see, e.g.*, *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 & n.17 (2014) (listing infancy, mental disability, and fraudulent concealment as examples of when equitable tolling is justified). Moreover, the prospective litigant "bears the burden of establishing [those] two elements." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005).

These requirements further what the Court recently reiterated is a "primary purpos[e] of limitations statutes"—"'barring a plaintiff who has slept on his rights.'" *Artis* v. *District of Columbia*, No. 16-460 (Jan. 22, 2018), slip op. at 19 (quoting *American Pipe*, 414 U.S. at 554).

Yet, as *CalPERS* acknowledged, *American Pipe* "did not consider the[se] criteria of the formal doctrine of equitable tolling in any direct manner," requiring no evaluation of "whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct." 137 S. Ct. at 2052. *American Pipe* is thus a relic of the *ancien regime* in which rules governing civil litigation were announced ad hoc rather than through legislation or the rulemaking process. Those days are long past. *See Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997) ("Federal Rules take effect after an extensive deliberative process involving many reviewers . . . . The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts

are not free to amend a rule outside the process Congress ordered.").

If *American Pipe* arose for the first time today, it is unlikely it would be decided the same way. Accordingly, the continued existence of the *American Pipe* tolling doctrine can best be justified on the basis of *stare decisis*. *Cf. Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411-13 (2014) (declining on *stare decisis* grounds to revisit the presumption of reliance in Rule 10b–5 cases established in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)). The necessary corollary is that *expanding* the doctrine to allow stacked class actions is unwarranted, as it would be incompatible with the Court's equitable tolling holdings.

Allowing stacked class actions impermissibly provides a second (and third, and fourth) round of tolling for every member of the original failed class. Each time, the claims of absent and unknown persons are deemed still timely simply by virtue of again falling within the scope of another proposed class. But any individual within that group cannot successfully "bear[] the burden of establishing" the elements needed for equitable relief. *Pace*, 544 U.S. at 418. As a starting point, he cannot successfully carry any burden before a court for the simple reason that he has not appeared at all. Moreover, such a person has *not* "been pursuing his rights diligently." *Menominee Indian Tribe of Wisc.*, 136 S. Ct. at 755. Indeed, he has not done anything at all, during the first class action or since.

Nor is there "some extraordinary circumstance" that "prevent[s]" any absent class member from "timely filing" his own suit (or a motion to intervene) after the first class fails. *Menominee Indian Tribe of Wisc.*, 136 S. Ct. at 755. If he has a viable claim, he

faces no obstacle at all, before, during, or after the first suit. Similarly, a failed class action is "an entirely common state of affairs" occurring hundreds or thousands of times a year. *Wallace*, 549 U.S. at 396; Federal Judicial Center, *Integrated Database: Civil 1988–present* (recording over 48,000 denials of class certification in cases terminated in the last three decades); *see also* Federal Judicial Center, *Impact of the Class Action Fairness Act on the Federal Courts* 17 (2008) (identifying approximately 21,000 class actions filed between July 1, 2001 and June 30, 2007). This is an *ordinary* circumstance, not an "extraordinary" one.

*Expanding* the tolling doctrine to indefinitely benefit those who repeatedly sit silent would push *American Pipe* well past the breaking point. As Justice Blackmun warned in the original decision, the rule "must not be regarded" as a way to "save members of the purported class who have slept on their rights." 414 U.S. at 561 (Blackmun, J., concurring). Endorsing the approach below would do exactly that.

## II. EXPANSION OF *AMERICAN PIPE* TOLLING RAISES SERIOUS SEPARATION-OF-POWERS CONCERNS

Expanding *American Pipe* tolling would also implicate constitutional concerns by impermissibly allowing the Judiciary "to jettison Congress' judgment on the timeliness of suit" under countless statutes. *Petrella*, 134 S. Ct. at 1967.

Statutory time limits "reflec[t] [Congress's] value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll.* v. *Ricks*, 449 U.S. 250, 260 (1980) (quotation omitted). Indeed, as the Court noted

just recently, Congress is entirely capable of enacting tolling provisions when it desires. *See Artis*, No. 16-460, slip op. at 4 (analyzing 28 U.S.C. § 1367(d)); *id.* at 7 n.4 (citing other tolling statutes).[2]

When Congress has exercised its authority to make such judgments, constitutional "separation-of-powers principles" block the courts from appointing themselves to a "legislation-overriding" role. *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (quotation omitted).

Wary of such constitutional incursions, the Court has been clear that judicially created exceptions to statutory deadlines must be "'very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.'" *Gabelli* v. *SEC*, 568 U.S. 442, 454 (2013) (quoting *Amy* v. *Watertown (No. 2)*, 130 U.S. 320, 324 (1889)). In a string of decisions since *American Pipe*, the Court has greatly curtailed the ability of courts to modify legislative timely filing requirements. *See generally* Mark A. Perry & David A. Schnitzer, *Plumbing the Depths of* American Pipe 2-3, Class Action Litig. Rep. (BNA), Aug. 11, 2017, http://bit.ly/2D91hBr.

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[2] Congress has enacted numerous additional provisions "suspending" or "tolling" statutes of limitations, at many different times, and in many different contexts. *See, e.g.*, 12 U.S.C. § 1787(b)(5)(F)(i); 12 U.S.C. § 1821(d)(5)(F)(i); 12 U.S.C. § 3419; 12 U.S.C § 4617(b)(5)(F)(i), (8)(E)(i); 12 U.S.C. § 5390(a)(3)(E)(i), (5)(E)(i); 15 U.S.C. § 16(i); 15 U.S.C. § 6606(e)(4); 15 U.S.C. § 6614(c)(3)(C); 18 U.S.C. § 3292; 22 U.S.C. § 1631k(c); 26 U.S.C. § 982(e); 26 U.S.C. § 6213(f)(1); 28 U.S.C. § 1332(d)(11)(D); 28 U.S.C. § 2263(b); 29 U.S.C. § 1854(f); 29 U.S.C. § 1724(d); 42 U.S.C. § 233(p)(3)(A)(ii); 42 U.S.C. § 247d–6e(d)(2); 46 U.S.C. § 53911(d); 46 U.S.C. § 30508(d); 50 U.S.C. § 4000(c); 50 U.S.C. § 4308.

The Court has disclaimed *any* ability to extend the time for filing suit when Congress has established a statute of repose, which reflects "a legislative judgment" to create an "absolute . . . bar on a defendant's temporal liability." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014) (quotation omitted; alteration original); *see also CalPERS*, 137 S. Ct. at 2055 (declining to expand *American Pipe* tolling to extend statutes of repose); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991) (holding that equitable tolling is "fundamentally inconsistent with the 1-and-3-year structure" of the limitations period in the Securities Exchange Act).

The Court has also limited judicial interposition of rules to toll statutes of limitations. In *Gabelli*, the Court considered whether a discovery rule can toll the government's deadline to bring a fraud case under a statute of limitations covering a broad range of civil enforcement actions. *See* 568 U.S. at 444-45. The Court refused to afford the government the same benefit given a private plaintiff in a fraud case, explaining that the reasoning for affording a private litigant such relief "does not follow for the Government" given the distinct "context of enforcement actions for civil penalties." *Id.* at 451.

This strictness is not reserved for plaintiffs: On the defense side, the Court has essentially abandoned the doctrine of laches, which historically "help[ed] courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances." *Petrella*, 134 S. Ct. at 1979 (Breyer, J., dissenting); *see id.* at 1978 (majority op.) (limiting use of laches to only "sufficiently extraordinary" circumstances); *see also SCA Hygiene*

*Prods.*, 137 S. Ct. at 967 (barring laches defense to Patent Act claims).

Again, *American Pipe* itself does not fit easily with these more recent precedents: By adopting a blanket tolling rule for class actions, the Court overrode statutory time limits in a wide swath of cases. The Court in 1974 was more willing to announce such sweeping rules than is the modern Court, and more recent decisions in this area reveal the shaky foundations of the *American Pipe* doctrine.

As a result, tolling should be limited to the first certification decision—as this Court has always understood it, and as the majority of appellate courts have recognized in enforcing the anti-stacking rule. The contrary approach, in which successive class actions also confer tolling benefits, allows "lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part and dissenting in part). That expansion of the *American Pipe* doctrine is irreconcilable with the long series of post-*American Pipe* decisions in which the Court has recognized that establishing the time for filing suit is properly the role of Congress, not the courts.

No principle of equity authorizes courts to set aside time-bars to benefit persons who have done nothing to protect their own rights, and any attempt to do so would violate the separation of powers. As the Court has repeatedly recognized in recent decisions, judicial adjustments of timely filing requirements threaten the constitutional separation of powers by arrogating to courts a function already exercised by Congress. The blanket tolling rule of *American Pipe*

already creates considerable tension with constitutional boundaries. *Extending* that rule to authorize stacked class actions by affirming the judgment below would result in impermissible "legislation-overriding." *SCA Hygiene Prods.*, 137 S. Ct. at 960 (quotation omitted).

## III. DECISIONS ALLOWING STACKED CLASS ACTIONS CANNOT BE RECONCILED WITH THE RULES ENABLING ACT

In the Sixth and Ninth Circuits, an otherwise untimely claim is made timely purely by function of Rule 23. That cannot be squared with the Rules Enabling Act's "pellucid" directive (*Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016)) that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Indeed, the Court has specifically emphasized the application of this principle to Rule 23, reiterating that the Rules Enabling Act does not permit using procedural rules to "giv[e] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S. Ct. at 1048; *see also Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (any suggestion that "Rule 23 establish[es] an entitlement to class proceedings" would "likely" run afoul of the Rules Enabling Act).

*American Pipe* tolling itself treats claimants differently based on their previous status as absent members of a putative class. If the claim was within the scope of someone else's failed attempt to invoke Rule 23, it is timely. Otherwise, the claim is extinguished. That creates considerable tension with the Rules Enabling Act.

But assuming the *American Pipe* doctrine could be reconciled with the Rules Enabling Act, the stacking approach endorsed by the court below is in open violation of the statutory proscription. Whereas *American Pipe* instructs people to file their own claims after the tolling period expires, the stacking approach affords additional tolling to still-absent individuals, who failed or refused to follow this Court's instruction to protect their own rights, solely by virtue of "participating" as unnamed class members in a second or subsequent class action. Their expired claims would be resuscitated, deemed timely, and tolled anew. If the second class is also rejected (as happened below), these same individuals would then be free to be part of a third round of litigation, either as individual litigants or, yet again, as unnamed class members. And so it would continue, *ad infinitum*. No such leeway is ever afforded claimants in individual actions absent extraordinary circumstances, and the Rules Enabling Act prohibits using procedural rules to achieve substantive ends on a blanket basis. *See Deposit Guaranty Nat'l Bank of Jackson, Miss.* v. *Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

The dispositive inquiry under the Rules Enabling Act is a simple one: Are the absent persons in the successive class action being afforded different rights simply because the second proceeding was filed as a proposed class action? The answer is equally simple: Yes—their claims are clearly untimely, and would be barred if asserted in an individual action, yet the Ninth Circuit revivified these claims and allowed them to proceed solely because they are being asserted in a class action. The court below therefore used a procedural rule to modify substantive rights (on both

sides of the "v.")—exactly what the Rules Enabling Act prohibits. This is yet another reason why the decision below should be reversed.

## IV. PRACTICAL CONSIDERATIONS SUPPORT FINALITY, NOT STACKED CLASS ACTIONS

The court below suggested that stacked class actions can be justified on the grounds of judicial economy, positing that stacking avoids burdensome protective filings from members of a putative class. *See, e.g.*, Pet. App. 13a. That suggestion rests on incorrect premises, both legal and factual.

First, the Court rejected the same argument in *CalPERS*, where it affirmed the Second Circuit's strict approach to the statutes of repose in the securities laws. As it explained, courts simply "lac[k] the authority to rewrite" statutory deadlines in the name of judicial economy. 137 S. Ct. at 2053 (quotation omitted). The same is true here: Even if the anti-stacking rule creates some inefficiencies, that is no reason for this Court to override Congress's determinations regarding the time periods in which suits under federal law must be filed.

Second, the actual burden imposed by theoretical protective filings is minimal, for courts and litigants alike. In *CalPERS*, the Court concluded the entire concept was "likely . . . overstated," finding no evidence of an "influx" in protective filings in the years since the Second Circuit adopted its no-tolling rule in securities class actions. 137 S. Ct. at 2054. Indeed, the Court found that was "not surprising" given the reality that "[m]any individual class members may have no interest in protecting their right to litigate on an individual basis." *Ibid.* In any event, as the Court

explained, it is not "onerous" to ask a potential individual plaintiff to file a "simple motion to intervene or request to be included as a named plaintiff in the class-action complaint." *Ibid.*

Similarly, as *CalPERS* made clear, the judicial system is up to the task of handling any theoretical influx: the courts have "ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion." 137 S. Ct. at 2054. Most obviously, the claimant can request, and the court can grant, a stay of an individual claim pending further progress in a related class action, pursuant to the inherent judicial power to "control the disposition of the causes on [the] docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *see, e.g.*, *Bargas* v. *Rite Aid Corp.*, No. 2:13-cv-03865, 2014 WL 12538151, at *1 (C.D. Cal. Oct. 21, 2014) (staying "all the related single plaintiff cases until a class certification decision has been issued in related case"). Similarly, parties can postpone initial disclosures (*Manual for Complex Litigation (Fourth)* § 40.21), stay counterclaims (*id.* § 40.53), and otherwise coordinate individual and class actions.

Real world experience shows that the anti-stacking rule is entirely workable. The majority of circuits have been applying the anti-stacking rule for many years, and there is no empirical evidence of an undue number of protective filings or judicial unmanageability. Any parade of horribles that respondents and their allies might hypothesize will be only that—hypothetical.

Third, and most importantly, many practical considerations militate in favor of enforcing statutes of limitations as written.

Under a stacked tolling regime, the litigation may continue "almost indefinitely," with "[t]he lawyers . . . simply fil[ing] a new, substantively identical action with a new class representative as soon as class certification is denied in the last previous action." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part and dissenting in part). The resulting repeated rounds of precertification motions and class certification briefing pose a considerably greater burden on the courts (not to mention the defendants) than processing placeholder protective complaints. *See generally Manual for Complex Litigation (Fourth)* pp. 242-82 (2004) (discussing complexities of precertification case management and certification decisions).

Additionally, proper adjudication becomes increasingly difficult as the events at issue recede into the distant past. Even flawless recordkeeping cannot prevent the loss of witnesses and memories over the course of years, "seriously diminish[ing] the ability of the parties and the factfinder to reconstruct what actually happened." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007), *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Moreover, some documents and data inevitably become irretrievable or unavailable. In fact, one of the raisons d'etre for statutes of limitations is to ensure cases are decided before "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

Title VII employment cases, a common type of class action, aptly illustrate this problem. Managerial intent is often a key issue, but one on which the evidence is particularly prone to "fad[ing] quickly with

time." *Ledbetter*, 550 U.S. at 631. Thus, Congress enacted "carefully prescribed," short deadlines for resolving Title VII claims. *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825-26 (1980). Yet under a stacked class action regime, it could easily be decades before a class is actually certified, or, alternatively, individuals step forward for separate adjudication of their claims.

These concerns are not conjectural. The Ninth Circuit was simply incorrect in asserting that the plaintiffs' bar will not try to stack class actions because they will have "little to gain from repeatedly filing new suits." Pet. App. 22a.

The Sixth Circuit's stacking decision, *Phipps*, illustrates what can happen: The underlying Title VII allegations date back to 1998, and the original action was filed in the Northern District of California in 2001, eventually reaching this Court a decade later, in 2011. *See Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011). After this Court denied certification for, among other things, lack of commonality (*see id.* at 359), the same plaintiffs' counsel filed *Phipps* in the Middle District of Tennessee. Contrary to the Ninth Circuit's unsupported assumption, these lawyers apparently thought they had something to gain from repetitive litigation.

Under the anti-stacking rule, the district court dismissed the claims asserted on behalf of absent persons in *Phipps*, but the Sixth Circuit reversed in 2015. *Phipps*, 792 F.3d at 653. On remand, after extensive discovery, further class certification briefing is scheduled for the spring of this year (2018), *two decades* after the start of the class period. *See* Order, No. 3:12-cv-1009 (M.D. Tenn. Nov. 14, 2017), ECF No. 145. More than six years ago, this Court decertified the na-

tionwide class and thus required former class members to file individual suits to protect their own rights. By disregarding that directive, the Sixth Circuit has subjected the employer to years of litigation, document retention obligations, and depositions—all at significant expense—defending against claims that under *American Pipe* itself are clearly time-barred. Judicial efficiency this is not.

And the inefficiency of allowing stacking would not be limited to Title VII cases (as in *Phipps*) or securities cases (as in this case). Rather, the consequences of affirmance would be felt across the full range of class action cases, as illustrated by the major stacking decisions in the courts of appeals:

| Case | Cause(s) of Action |
|---|---|
| *Basch* v. *Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998) | Age Discrimination in Employment Act |
| *Korwek* v. *Hunt*, 827 F.2d 874 (2d Cir. 1987) | Sherman Act; Clayton Act; New York antitrust law; Commodity Exchange Act; common law fraud; Racketeer Influenced and Corrupt Organizations Act (RICO) |
| *Yang* v. *Odom*, 392 F.3d 97 (3d Cir. 2004) | Securities Exchange Act of 1934; Securities Act of 1933 |
| *Angles* v. *Dollar Tree Stores, Inc.*, 494 F. App'x 326 (4th Cir. 2012) | Title VII of the Civil Rights Act of 1964 |
| *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985) | Farm Labor Contractor Registration Act; breach of contract |

| Case | Cause(s) of Action |
|---|---|
| *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015) | Title VII of the Civil Rights Act of 1964 |
| *Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011) | Telephone Consumer Protection Act |
| *Great Plains Trust Co.* v. *Union Pac. R.R. Co.*, 492 F.3d 986 (8th Cir. 2007) | Breach of contract; fraud; unjust enrichment |
| *Resh* v. *China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017) | Securities Exchange Act of 1934; Securities Act of 1933 |
| *Griffin* v. *Singletary*, 17 F.3d 356 (11th Cir. 1994) | Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 1983 |
| *Ewing Indus. Corp.* v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015) | Telephone Consumer Protection Act |

Fourth, virtually every federal law that is privately enforceable contains a statute of limitations, and in each such provision Congress has made a judgment of when "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers*, 321 U.S. at 349. The Ninth Circuit's approach wipes out those determinations in one broad stroke, leaving the ability of plaintiffs' counsel to recruit a new named plaintiff as the only constraint on unending tolling.

Faced with the prospect of whack-a-mole class actions, some defendants will be forced to settle on a classwide basis even after initially defeating class certification, and even where the claims of unknown persons are obviously untimely. That provides financial

incentives for attorneys to file successive class actions, but is neither lawful nor equitable. Rather, once class certification has been denied or rejected, former members of the proposed class—who have benefited from automatic tolling since the case was filed as a class action—must within the remaining limitations period file their own suits or intervene in a pending suit. This Court has already held that this is the law. *Smith*, 564 U.S. at 313 n.10. The Ninth Circuit's misguided effort to change the law by extending tolling to successive class actions should be rejected out of hand.

* * *

From the outset *American Pipe* tolling was a "generous" rule, "inviting abuse." *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring). Expansion of the doctrine to allow repeated, stacked class actions is unwarranted. The approach approved by the court below fails this Court's stringent requirements for equitable relief from statutory deadlines, impinges on Congress's authority to enact statutes of limitations, violates the Rules Enabling Act, and disserves practical considerations. Reversal is warranted.

## CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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No. 17-432

In the

# Supreme Court of the United States

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CHINA AGRITECH, INC.,
*Petitioner*,

v.

MICHAEL RESH, ET AL.,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

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## STATEMENT OF INTEREST[1]

*Amicus curiae* DRI – The Voice of the Defense Bar (www.dri.org) is an international organization composed of more than 22,000 attorneys who defend the interests of industries, businesses, and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of the civil defense bar; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* in carefully selected cases in which this Court is presented with questions that are exceptionally important to civil defense

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[1] Pursuant to Supreme Court Rule 37(a) Petitioner and Respondents Schoenke, Heroca Holding B.V., and Ninella Beheer, B.V.—the only respondents to have entered an appearance in this Court—have submitted letters granting blanket consent to *amicus curiae* briefs. As the district court's docket reflects (No. 2:14-cv-05083, ECF No. 110 (C.D.C.A. Dec. 13, 2017), Charles Law's claims were dismissed with prejudice on entirely different grounds, which are not at issue in this appeal, and he waived any right to respond to the petition for certiorari. In accordance with Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

attorneys, their clients, and the conduct of civil litigation.

The businesses that DRI's members represent are regular targets of class action litigation. Across industries within the United States, businesses spent $2.7 billion on class action litigation in 2016.[2] Managing the litigation risk of class action lawsuits is among the chief concerns of businesses represented by DRI members. Class actions create unpredictable risks and complicate exposure estimates that are critical to business and litigation planning. They also have the well-recognized abusive potential to put businesses to a Hobson's choice—take the risk of potentially ruinous liability, or capitulate and buy peace.

DRI's members regularly litigate the defense of complex class action issues, and counsel businesses about their legal exposure in class action litigation. Their collective experience offers an informed perspective on the negative policy implications of indefinite class action tolling that the Ninth Circuit should have thoroughly analyzed, but did not.

The Ninth Circuit here followed the Sixth Circuit's drastic expansion of an equitable tolling rule applicable to class actions that this Court created decades ago, before class actions became an unfortunate cost of doing business in this country. *See*

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[2] 2017 CARLTON FIELDS CLASS ACTION SURVEY, www.classactionsurvey.com/pdf/2017-class-action-survey.pdf at 2.

*Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork, & Seal Co. v. Parker*, 462 U.S. 345 (1983). As broadened by the Ninth and Sixth Circuits, this tolling rule, if allowed to stand, would permit litigants to "stack" equitable tolling periods and thereby indefinitely toll statutes of limitation.

This rule would significantly add to the burden of litigation uncertainty under which the businesses served by DRI's members operate. These companies—who employ millions of people and are the economic engine of the country—rely on reasonable predictability and finality in the civil justice system to operate efficiently. The expansion of judge-made exceptions to statutes of limitation undermine those interests. The decision below amplifies the abusive potential of the class action device by hamstringing an important statutory defense. It is critical to those businesses that this Court correct this error.

## SUMMARY OF ARGUMENT

Rule 23 provides a carefully circumscribed exception to the rule that litigants must pursue their claims individually. It was designed to balance the goals of litigation efficiency with fairness to defendants facing the prospect of aggregated claims. Over forty years ago, the Court created a limited equitable exception to statutes of limitation in the context of class actions under Rule 23. *Am. Pipe*, 414 U.S. at 561; *Crown, Cork*, 462 U.S. at 354. It, too, reflects a balancing of interests: to effectuate the litigation-efficiency goal of Rule 23 without unduly impairing "the functional operation" of federal

statutes of limitation and the protections they afford defendants. *Am. Pipe*, 414 U.S. at 554. To strike that balance, *American Pipe* must be read to hold that a timely filed class action complaint pauses the limitations clock for prospective class members, who, if certification is denied, may pursue their claims *on an individual basis* within whatever is left of the statutory limitations period. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (stating that *American Pipe* tolls the "*individual claims* of purported class members" (emphasis added)).

Since these decisions, the Court has never expanded *American Pipe* tolling. Most lower courts generally have declined to expand it as well, recognizing the perils and mischief such expansion would introduce.[3] These courts forbid litigants from

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[3] *See, e.g., Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. Permitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations against all such potential litigants, regardless of how many times a court declines to certify the class."); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (same); *Korwek v. Hunt*, 827 F.2d 874, 870 (2d Cir. 1987) (concluding that extending *American Pipe* to stacked class actions is "inimical" to statutes of limitations); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (holding that allowing putative class members to "piggyback one class action onto another" would lead to abuse).

"stacking" tolling periods by serially refiling new class actions that would-be time-barred but for the equitable exception created by *American Pipe*. That limit is fully consistent with the balancing of equities reflected in *American Pipe* and *Crown, Cork*.

The Ninth Circuit has upended that balance. Under the rule it adopted, an individual granted a temporary and exceptional reprieve from a statutory deadline to preserve his own claims may employ subsequent class actions to extend the reprieve indefinitely—including for all other putative class members who chose not to sue. Under this approach, multiple tolling periods are "stacked" on those that precede them, federal statutes of limitations are thereby suspended indefinitely, and businesses are unable to close their books on unpredictable liability exposure.

The Ninth Circuit's reasoning abandons first principles. The class action itself is an exceptional procedural device with well-recognized abusive potential. *American Pipe* equitable tolling is further an exceptional remedy, with its own abusive potential. Contrary to the Ninth Circuit's interpretation, this Court's decisions in *Shady Grove* and *Tyson Foods* do not require marrying the two—extending a limited equitable reprieve for individual litigants to would-be class representatives under Rule 23.[4] The Ninth Circuit paid little attention to the negative policy consequences of indefinite tolling, when that should have been at the heart of the court's analysis. Indeed,

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[4] *Shady Grove Ortho. Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

*Smith v. Bayer*, on which the Ninth Circuit mistakenly relied in this regard, underscores how far-reaching those consequences are.[5]

The rule adopted by the Sixth and now the Ninth Circuits will negatively impact the civil justice system and those who rely on it to settle disputes with fairness and finality. Permitting plaintiffs to use the class action device to circumvent statutes of limitation indefinitely fosters strategic delay and promotes inefficiency. Most critically from the perspective of *amicus curiae*, it also significantly and unjustifiably burdens the businesses that are the primary targets of class action litigation.

## ARGUMENT

### I. THE NINTH CIRCUIT'S EXPANSION OF *AMERICAN PIPE* DOES NOT INDEPENDENTLY PASS EQUITABLE MUSTER.

#### A. Stacked class action tolling creates significant new policy concerns.

The rule adopted in *American Pipe* and *Crown, Cork* allows would-be class members to "bet" on class certification without losing their individual claims if they lose the bet. *See Am. Pipe*, 414 U.S. at 561; *Crown, Cork*, 462 U.S. at 354. Extending this limited tolling period, the Court found, avoids burdening courts with multiple protective filings that would reduce "the efficiency and economy of litigation which

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[5] *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

is a principal purpose of the [class action] procedure." *Am. Pipe*, 414 U.S. at 553, 554; *see also Crown, Cork*, 462 U.S. at 350 (noting same potential "inefficiencies" justify tolling for individually filed claims as well as interventions in the failed class action).

Of course, to further the efficiency goal of Rule 23, *American Pipe* tolling also interferes with statutes of limitation that are "'fundamental to a well-ordered judicial system.'" *Artis v. D.C.*, No. 16-460, slip. op. at 19 (U.S. Jan. 22, 2018) (quoting *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980)). A tolling rule that stops the limitations clock—as in *American Pipe*—has the potential to extend the life of otherwise time-barred claims "not only by weeks or months but by many years." *Artis*, (Gorsuch, J., dissenting), slip op. at 1.

*American Pipe* tolling also creates the potential for abuse, including an incentive for lawyers "to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." *Am. Pipe*, 414 U.S. at 561 (Blackmun, J., concurring). And as reflected in Justice Blackmun's comment, it not only protects those who were aware of their claims and chose to bet on class certification, but those who were ignorant through lack of diligence and do not merit equitable relief. Just last Term, the Court remarked on *American Pipe*'s failure to consider the plaintiffs' diligence or "whether some extraordinary circumstance prevented them from intervening earlier[.]" *Cal. Pub. Emps.' Ret. Sys. (CalPERS) v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017).

But whatever its analytic shortcomings, *American Pipe* created an equitable exception with a fixed duration. Tolling pauses the limitations clock "only during the pendency of the motion to strip the suit of its class action character." *Am. Pipe*, 414 U.S. at 561. If certification is denied, the equitable reprieve lasts only until the residuum of the statutory limitations period runs out—a mere 11 days in *American Pipe*. 414 U.S. at 561. This limited equitable exception balances efficiency under Rule 23 with the important goal statutes of limitation serve—to "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (quoting *R.R. Tele. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348 (1944); *see also Artis*, slip op. at 19 (observing that primary purposes of statutes of limitation include to prevent surprise to defendants and bar those who have slept on their rights) (citing *Am. Pipe*, 414 U.S. at 554)). It reduces only temporarily the ability of businesses facing class actions to estimate exposure and predict and manage litigation risk.

The Ninth Circuit upended this balance by jettisoning the requirement that a class action complaint be timely-filed to have tolling "power." Pet. App. 22a; *see also Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652 (6th Cir. 2015) (extending equitable tolling to class actions filed after the statutory deadline to the same extent as individual actions).

It is self-evident that the policy concerns raised by temporarily tolling a statute of limitations pale in comparison to those raised by tolling it indefinitely. Yet, the Ninth Circuit did not examine the effects of the rule it created through the lens of equity. Consequently, it paid little attention to the negative implications of drastically curtailing a statutory defense on which businesses rely to provide predictability, certainty, and finality in class action litigation.

Equity demands a thorough policy analysis of stacked class action tolling that takes account of the practical realities of modern class action litigation. Since the Court adopted *American Pipe* tolling over forty years ago, the "exceptional" class action device has become an unfortunately routine cost of doing business in the United States, and that cost trends upward. Of the 70 percent of surveyed businesses managing at least one class action in 2016, 17.6 percent reported facing class claims "every year or two" (up from 11.9 percent in 2015), and the percentage reporting class actions to be "rare" fell by six points, to 13.2 percent. CARLTON SURVEY, *supra* n. 2 at 11. As compared with 2015, according to the survey authors, "twice as many companies are facing bet-the-company class actions in which the exposure is deemed potentially devastating to the company." *Id.* at 14.

The decades since *American Pipe* also have seen the proliferation of class actions based on technical statutory violations—frequently involving federal statutes—in which putative class members suffered

little or no economic harm. *See* Joanna Shepherd, An Empirical Survey of No-Injury Class Actions, Legal Studies Research Paper Series, available at http://ssrn.com/abstract=2726905 (2016). In 432 such actions pending during 2000 to 2015, the aggregate monetary value of settlements and awards was estimated to be approximately $4 billon. *Id.* at 2.

It is far from clear, however, that the increase in class action litigation has benefitted consumers. *See, e.g.*, Shepherd at 2; Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*.[6] What is clear is that class actions, whether meritorious or not, impose significant costs on businesses. One aspect of that cost is the unpredictability stemming from the complexity and variable application of class action law. *See, e.g.*, Edward Soto and Erica Rutner, *Ascertainability Requirement Leads to Inconsistency and Uncertainty in Class Actions*.[7] Another is the potential for huge losses when aggregated claims are tried. Indeed, courts have recognized that "however small" the risks may be "of potentially ruinous liability," the risks inherent in class actions can put "hydraulic pressure on defendants to settle, avoiding the risk . . . ." *E.g.*, *Newton v. Merrill Lynch Pierce Fenner & Smith*, 259 F.3d 154, 163 (7th Cir. 2001).

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[6] http://mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

[7] apps.americanbar.org/litigation/committees/products/articles/summer2016-0816-ascertainability-requirement-leads-to-inconsistency-undertainty-class-actions.html.

Stacked class action tolling has the potential to exponentially increase this unpredictability and uncertainty in class action litigation by removing a deadline by which to calculate risk. *See McCann v. Hy-See, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011) ("[B]usiness planning is impeded by contingent liabilities that linger indefinitely."). Consumers as well as business are harmed by the resulting inefficiency.

By extending *American Pipe* tolling without meaningfully analyzing the consequences, the Ninth Circuit disregarded the rule's roots in equity. Equitable tolling is a "rare remedy to be applied in unusual circumstances[.]" *Wallace v. Kato*, 549 U.S. 384, 396 (2007). Before expanding a "rare remedy," courts must address whether the result would be equitable. The very purpose of equity is to provide courts with the flexibility "'to meet new situations" and determine on a case-by-case basis whether extraordinary circumstances justify relief from legal requirements. *Holland v. Fla.*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

### B. Rule 23 does not displace equitable principles.

In large part, the Ninth Circuit treated policy concerns dismissively based on its misinterpretation of two of this Court's opinions. Pet. App. 20a (citing *Shady Grove v. Allstate Ins. Co.*, 559 U.S. 393 (2010), & *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)). In effect, it read these cases to create a presumptive right to invoke Rule 23 that trumps

equitable principles. *See* Pet. App. 22a (unless court applies comity or preclusion principles, plaintiffs who satisfy Rule 23 "are entitled to bring their timely individual claims as named plaintiffs in a would-be class action"); *see also Phipps*, 792 F.3d at 653 (plaintiffs who benefitted from *American Pipe* tolling are "entitled to seek class certification under Rule 23") (citing *Shady Grove*, 559 U.S. at 398)). It is important that the Court correct this error, and reaffirm that Rule 23 does not immunize class actions from precepts of equity.

*Shady Grove* did not address equitable principles; it resolved a conflict between Rule 23 and a New York state law that prohibited class actions in certain types of cases. The Court held that because Rule 23 was applicable and valid, it controlled. 559 U.S. at 398. It rejected the defendant's attempt to avoid the conflict by distinguishing "eligibility" for class treatment under New York law from certifiability under Rule 23. The Court explained that Rule 23 is not limited to claims "made eligible for class treatment by some *other* law." *Id.* at 399 (emphasis in original). Rather, it "permits all class actions that meet its requirements[.]" *Id.* at 401.

It was in the context of illustrating the conflict between Rule 23 and state law that the Court referred to "a categorical rule" entitling a plaintiff to invoke Rule 23 regardless of "some *other* law." *Id.* at 399 (emphasis in original). Disregarding context, the Ninth Circuit interpreted "other law" to include federal statutes of limitation Pet. App. 17a (the "statute of limitations is not part of Rule 23, but is,

instead, 'some other law'"); *see also Phipps*, 792 F.3d at 652 (citing *Shady Grove*'s reference to a "categorical rule" to support extension of equitable tolling to class actions). Under this reasoning, statutes of limitation would never apply to class actions because limitations are "other law" not referenced in the text of Rule 23. This would be an absurd result, not to mention at odds with *American Pipe* itself. This Court should set the record straight to prevent other courts from similarly misconstruing the relationship between Rule 23 and statutes of limitation.

The Ninth Circuit similarly misread *Tyson Foods*, where the Court held that it would be inconsistent with the Rules Enabling Act to bar statistical evidence relevant to an individual claim simply because it is offered on behalf of a class. *Tyson Foods*, 136 S. Ct. at 1046–48 (citing 28 U.S.C. § 2072(b)). Though *Tyson Foods* had nothing do with equitable exceptions, the Ninth Circuit read this discussion to support, if not mandate, extending equitable tolling to class actions to the same extent as individual actions. Pet. App. 21a.

But if the Rules Enabling Act constrains courts' equitable power to treat class and individual actions differently when justice requires, then *American Pipe* itself was wrongly decided. If the Court has the inherent equitable power to create a class action-specific tolling rule, it has equal power to limit the scope of that rule.

The Ninth Circuit's error stems from an implicit assumption that Rule 23, not equitable principles, informed the analysis in *American Pipe*. But recently

in *CalPERS*, the Court put to rest the notion that Rule 23 requires equitable tolling in class actions, explaining:

> Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.

*CalPERS*, 137 S. Ct. at 2051–52; *cf. Holland*, 560 U.S. at 632–33 (explaining in federal habeas case, "[n]o pre-existing rule of law or precedent demands a rule" prohibiting equitable tolling based on attorney misconduct).

In sum, neither Rule 23, the Rules Enabling Act, nor this Court's precedents require expanding *American Pipe* tolling to class actions. To the contrary, this Court's relevant opinions—those addressing the rare remedy of equitable tolling—preclude this expansion.

## II. STACKED CLASS ACTION TOLLING IS INEQUITABLE.

The Ninth Circuit went astray by not returning to first principles before undertaking its analysis. The class action device is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v.*

*Yamasaki*, 442 U.S. 682, 700–01 (1979)). Equitable tolling is further an exceptional remedy, available only in extraordinary circumstances. *See Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 756 (2016). In other words, *American Pipe* applied an exceptional remedy to already exceptional procedural device. The result was to give that exceptional device an exceptional power—to toll limitations for individuals with otherwise untimely claims. But to have that power, the class action itself had to be timely.

The policy concerns raised by giving this "exceptional" tolling power to an indefinite series of *untimely* class actions overwhelmingly counsel against doing so. Most critically for the businesses that *amicus curiae*'s members represent, handing operational control of statutes of limitations to the lawyers who file class actions vastly increases the uncertainty and unpredictability already inherent in class action litigation. And the mere status of "would-be class representative" does not mean an individual meets the threshold requirements to merit equitable relief in the first place.

### A. Tardy prospective class members do not meet threshold prerequisites.

A litigant seeking equitable tolling must show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649. These two components are "'elements,' not merely factors of indeterminate or commensurable

weight." *Menominee*, 136 S. Ct. at 756 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The justifications offered in defense of stacked class action tolling satisfy neither requirement.

First, no obstacle prevents would-be class representatives from timely filing their own class actions. *Id.* (explaining that extraordinary circumstances means something outside the litigant's control). Betting mistakenly that a timely filed class will be certified is not even "'a garden variety claim of excusable neglect,'" much less an extraordinary circumstance excusing delay. *Id.* at 757 (quoting *Irwin*, 498 U.S. at 96); *see also id.* at 756 (holding that individual litigant's mistaken belief that it fell within a putative class and would benefit from *American Pipe* tolling insufficient).

Second, those who wish to serve as representative plaintiffs (and their lawyers) face elevated responsibilities. *See Nat'l Ass'n of Reg'l Med. Programs v. Mathews*, 551 F.2d 340, 346 (D.C. Cir. 1976) ("Class actions involve the delegation of authority to a named representative to pursue a common goal."). Would-be class representatives hardly exhibit diligence by waiting to see what happens before throwing their hats in the ring. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (noting that statutes of limitation encourage "diligent prosecution of known claims").

Unnamed class members who would benefit from stacked tolling likewise face no impediment to seeking relief individually after certification is

denied—thanks to *American Pipe*. The burden of doing so is low, not an obstacle. *See Menominee*, 136 S. Ct. at 757 (supporting that risk and expense of filing timely claim "is far from extraordinary").

As the Court recognized in *CalPERS*, *American Pipe* did not expressly consider the obstacle and diligence prongs of equitable tolling. 137 S. Ct. at 2052. Those two elements are threshold requirements under the Court's more recent opinions. One might argue they were not met in *American Pipe* and *Crown, Cork*. But if *American Pipe* is susceptible to this criticism, it is even more important that any proposed expansion of its holding face a more rigorous examination.

In any event, stacked class action tolling fails even under the relaxed standards of diligence and extraordinary circumstances the Court applied in *American Pipe* and *Crown, Cork*. Individuals who rely on a timely filed class action to vindicate their rights, the Court found, are acting rationally, not exhibiting a lack of diligence. *See Crown, Cork*, 462 U.S. at 352 (explaining that because Rule 23 "permits and encourages" reliance on class representatives to prosecute claims, unnamed class members who rely on them are not "sleeping on their rights"). It is fair to allow such individuals to "bet on" the class action achieving certification and vindicating their claims without risking loss of those claims. *See Am. Pipe*, 414 U.S. at 553. That unnamed class members ignorant of their claims also benefit from *American Pipe* tolling has only limited inequitable effect because the incidental benefit is of limited duration. *Id.* at 561.

By contrast, the negative policy implications of *indefinite* tolling are myriad. Stacked tolling rewards foot-dragging by would-be class representatives. It takes the pressure off their lawyers to swiftly marshal and preserve evidence. It rewards unnamed class members who forgo the effort and cost of pursuing individual claims to prolong their risk-free ride on the class action train. *Cf. Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) ("Allowing tolling to continue beyond the point at which the § 16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable*[.]" (emphasis in original)). And it gifts non-diligent class members with the opportunity to belatedly discover and pursue stale claims or receive an unexpected windfall recovery if a class ever makes it to the finish line. A rule that incidentally and temporarily rewards those who failed to discover their claims within limitations may be compatible with equity, as the *American Pipe* Court found. A rule that lets them sit on their rights indefinitely, however, is not.

### B. Stacked class actions harm businesses, including by significantly eroding the finality and certainty that statutes of limitation provide.

The Ninth Circuit's rule empowers class action lawyers to relitigate serially the class certification question regardless of statutory deadlines. One can hardly imagine a rule more "inconsistent with the

functional operation of a statute of limitations." *Am. Pipe*, 414 U.S. at 554; *see Credit Suisse*, 566 U.S. at 227–28 ("The potential for . . . endless tolling in cases in which a reasonably diligent plaintiff would know of the facts underlying the action is out of step with the purposes of limitations periods in general."); *CalPERS*, 137 S.Ct. at 2054 (rejecting proffered interpretation of statute of repose to create limitless causes of action "reveals its implausibility," because "[t]aken to its logical limit, an individual action would be timely even if it were filed decades after the original" conduct underlying the claim). Extending *American Pipe* equitable tolling to indefinitely suspend a statute of limitations flouts "statutory intent" as much as extending it to statutes of repose, which the Court refused to do. *Id.* at 2050 (observing that statutes of repose reflect "statutory intent" to create an absolute time bar) (citing *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014); *cf. Artis*, (Gorsuch, J., dissenting) (explaining that creating time bars is "'one of the most sacred and important of sovereign rights and duties.'") (quoting *Hawkins v. Barney's Lessee*, 5 Pet. 457, 466 (1831)).

Statutes of limitation are a critical protection for businesses subject to class action lawsuits. Interfering with their operation does not just prejudice defendants by requiring them to defend against stale claims. It forces business defendants—i.e., the typical target of class actions—to keep contingent liabilities on their books without the ability to predict reliably when the risk may end. *Cf. McCann v. Hy-See, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011)

("[B]usiness planning is impeded by contingent liabilities that linger indefinitely.").

In a litigation environment where facing class actions is now the price of doing business, this uncertainty is a huge burden on companies and the economy. In the Mayer Brown study, of 148 class actions filed in or removed to federal court in 2009, 14 percent (21 cases) had not been resolved by early September 2013, leaving the defendants with unknown contingent liability for over three years. Mayer Brown at 5. This statistic is concerning enough to businesses managing litigation risk. But if winning a years-long battle on class certification merely paves the way for others to spring up in its place, the incentive to fight is reduced and the "hydraulic pressure" to settle increased. *Newton*, 259 F.3d at 163. As it stands, only 28% of companies have insurance coverage for class action defense, and those that do are covered for 30% or less. CARLTON SURVEY, *supra* n. 2 at 18. The per-matter spending per year on outside counsel ranges from $0.2 million to $1.5 million for routine matters, to $3 to 30 million for "bet the company" litigation. *Id.* at 17.

Stacked tolling would make it significantly harder for companies to assess future liabilities, plan defense costs, and manage litigation risk, with ill effects on the economy as a whole. Money put in reserve in anticipation of further litigation is money that is not spent on innovation and expansion, hiring new employees and increasing pay, and providing goods and services to consumers.

And the problem of stale claims takes on heightened significance when tolling may continue indefinitely. In *American Pipe*, the Court found that the problems of unfair surprise and lost evidence were minimized because, "[w]ithin the period set by the statute of limitations, the defendant has the essential information necessary to determine both the subject matter and size of the prospective litigation[.]" 414 U.S. at 554–55. The Ninth Circuit addressed the stale-claim concern in a single sentence, citing the discussion from *American Pipe*. Pet. App. 21a. It thereby disregarded the critical distinction between a limited tolling rule—as in *American Pipe*—and an indefinite one. Under the latter, the negative impact on the defendant's ability to vigorously defend itself continues to grow as memories progressively fade, witnesses move or pass away, and documents outside the control of the parties to the original suit get lost or destroyed. Fairness demands that "'the right to be free of stale claims'" at some point outweighs "'the right to prosecute them.'" *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Tele.*, 321 U.S. at 349). Yet this fairness analysis was ignored.

This inevitable deterioration of evidence not only threatens the fairness of a trial on the merits, it may also skew the certification question in plaintiffs' favor. Evidence outside the control of the parties to the original class action may be critical. *See In re St. Jude Med., Inc.*, 522 F.3d 836, 840–41 (8th Cir. 2008) (concluding predominance factor was not met based on individual medical histories of class plaintiffs). Moreover, indefinite tolling itself makes it likely that the scope and contours of subsequent class actions—

perhaps filed a decade or more after the original statutory deadline—will differ, as lawyers hone their arguments and learn from their mistakes. The mutability of serial class claims that stacked class tolling invites undermines any credible argument that an initial class action puts the defendant on notice of the claims against it, or that an earlier class certification denial diminishes the risk of later certification on the second, third, or even fourth bite at that apple.

The Ninth Circuit dismissed these concerns in reliance on *Smith v. Bayer*, 564 U.S. 299 (2011). According to the Ninth Circuit, *Smith* establishes that the negative policy implications of serial relitigation of class certification are inevitable, negligible, and curable through nebulous doctrines like comity. Pet. App. 19a ("W]e follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns'") (quoting *Phipps*, 792 F.3d at 653). This misreading of *Smith* is of serious concern to companies who depend on statutes of limitation in managing their business-litigation risk. *Smith* had nothing to do with statutes of limitation. The Court there declined to modify the *law of preclusion* to prohibit unnamed putative class members in a failed class action from relitigating the certification question. It observed that the policy concerns raised by serial relitigation of class certification were Bayer's "strongest argument[.]" *Id.* at 316. It rejected Bayer's policy argument not because it was weak, but because the policy concerns in the context of that case were insufficient grounds for

ignoring a central tenet of an established legal doctrine. *Id.* at 313, 316 (acknowledging that rule against nonparty preclusion "perforce leads to relitigation of many issues" as a function of its "fundamental nature").

This case stands on a different footing. Equitable tolling is an exception to rules of law; preclusion principles *are* rules of law. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (explaining that issue preclusion is well-established in the common law). *Smith*'s refusal to modify preclusion law based on policy concerns does not bear on whether a judge-made equitable rule should be expanded *despite* policy concerns. In *Shady Grove*, for example, the Court treated the forum-shopping its decision would cause as a necessary evil of Congress's decision to create "a uniform system of federal procedure." *Shady Grove*, 559 U.S. at 415–16. But an incentive to forum-shop would be "*unacceptable when it comes as the consequence of judge-made rules* created to fill supposed 'gaps' in positive federal law." *Id.* (emphasis added). Forum-shopping enabled by a judge-made rule of equity is equally unacceptable.

The Court in *Smith* raised—briefly and without discussion—*stare decisis* and comity as principles that could "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." 564 U.S. at 317. It did not suggest, however, that these discretionary and elastic principles fully addressed the ill effects of serial relitigation in all contexts. *Stare decisis* and comity, in effect, were the best the *Smith*

Court could offer while adhering to its "'constrained approach to nonparty preclusion.'" *Id.* at 313 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008)). That does not imply that these doctrines are adequate substitutes for statutes of limitation. And they are not. *See Smentek v. Dart*, 683 F.3d 373, 375 (7th Cir. 2012) (describing the *Smith* Court's reference to comity as "cryptic," and refusing to revise certification decision based on comity); *see also Ford v. Ford Motor Co.*, 2014 WL 12570925, at *3–4 (C.D. Cal. 2014) (agreeing that that the refence to comity in *Smith* is "cryptic"). The effectiveness of such doctrines in curbing serial relitigation is uncertain, at best.[8]

Far from supporting the rule adopted by the Ninth Circuit, *Smith*—which removes preclusion principles as a check on serial relitigation— illustrates

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[8] We are aware of only four cases since *Smith* in which a district court has cited comity in denying class certification. *Ott v. Mortg. Inv'r Corp. of Ohio*, 65 F. Supp. 3d 1046, 1063–64 (D. Or. 2014); *Murray v. Sears, Roebuck, & Co.*, 2014 WL 563264 (N.D. Cal. 2014); *Williams v. Foods*, 2013 WL 4067594, at *2 (N.D. Cal. 2013); *Edwards v. Zenimax Media Inc.*, 2012 WL 4378219, at *4 (D. Colo. 2012). At least four courts have expressly declined to follow another court's previous class certification ruling. *See Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274 (W.D. Wash. 2012) (reversed by *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015) (reversed by *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)); *Ford v. Ford Motor Co.*, 2014 WL 12570925, at *3–4 (C.D. Cal. 2014); *Heibel v. U.S. Bank Nat. Ass'n*, 2012 WL 4463771, at *4 (S.D. 2012); *In re Wells Fargo Wage & Hour Emp't Practices Litig. (No. III)*, 2012 WL 3308880, at *22 (S.D. Tex. 2012) (granting conditional class certification).

why it is so important for this Court to bar indefinite tolling of class actions.

### C. Stacked class action tolling increases the abusive potential inherent in the class action device and promotes inefficiency.

Stacked class action tolling virtually guarantees increased strategic abuse of class actions. Class actions by their nature allow weak or spurious claims to be aggregated and "weaponized," pressuring defendants to buy peace rather than fight and risk losing. *E.g.*, *Newton*, 259 F.3d at 163. Justice Blackmun cautioned that *American Pipe* tolling of individual claims "must not be regarded as encouragement to lawyers" to file placeholder class actions "to attract and save members of the purported class who have slept on their rights." *Am. Pipe*, 414 U.S. at 561 (Blackmun, J. concurring). The Ninth Circuit paid no heed to this warning. Yet there is no limit to the abusive potential of which Justice Blackmun warned if the duration of tolling rests in the hands of the very lawyers he addressed.

The potential for abuse would be unacceptable even if stacked tolling furthered the goals of Rule 23, but it does not. The overriding theme of *American Pipe* and *Crown, Cork* is that early certification decisions streamline litigation, reduce costs, and discourage strategic delay. *See Am. Pipe*, 414 U.S. at 547 (observing that 1966 amendments precluded litigants from "await[ing] developments in the trial or even final judgment" before joining a class). These goals are

reflected in the directive that courts should rule at "[a]n early practicable time" after suit is filed. Fed. R. Civ. P. 23(c)(1)(A). *American Pipe* referred to this directive five times. *See id.* at 542 n.5, 547, 549, 552; *id* at 562 (Blackmun, J., concurring).

Under stacked class action tolling, the denial of class certification no longer produces certainty, even when a statutory deadline has long passed. That result does not effectuate economy of litigation under Rule 23—it undermines it.

What is more, it instead promotes efficiency to require those litigants who sincerely wish to serve as class representatives (and their lawyers) to enter the fray *before* limitations periods have run. Nothing stands in their way. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (7th Cir. 1997) (noting that unnamed class members can opt out, seek replacement, or intervene if they wish to assert control). The benefits of promptly determining class leadership is reflected in the "lead plaintiff" provision of the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u. Rather than waiting to see how matters develop, plaintiffs who wish to lead are encouraged to step up and assume fiduciary responsibilities, including loyalty to the interests of the class. *See In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 198 (3d Cir. 2005); *see also* James D. Cox et al., *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1587 (2006) ("Congress expected that [the lead plaintiff] would actively monitor the conduct of a securities fraud class action

so as to reduce the litigation agency costs that may arise when counsel's interests diverge from those of the shareholder class.").

A fixed statutory deadline has a similar salutary effect in a Rule 23 class action. Federal courts are well-equipped to settle disputes among litigants and lawyers vying for control, and can achieve economies through coordination and consolidation where appropriate. *See, e.g.*, Transfer Order, In re Volkswagen "Clean Diesel" Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 2672, (J.P.M.L. Dec. 8, 2015), ECF No. 950. Even if multiple class actions proceed at the same time, a fixed deadline temporally limits any inefficiency. Requiring the timely assertion of class claims discourages shoddy lawyering by taking away the safety net of perpetual tolling. And it raises the likelihood that courts evaluating motions to certify, and juries deliberating the merits in certified class actions, will make their decisions based on the best evidence, gathered before "'memories have faded, and witnesses have disappeared.'" *Burnett*, 380 U.S. at 428 (1965) (quoting *R.R. Tele.*, 321 U.S. at 348).

***

Equitable exceptions to legal rules should relieve injustice, not promote it. There is no injustice in holding would-be class representatives to a statutory deadline. *Amicus curiae*'s members daily represent businesses defending against class action litigation. From their perspective, letting tardy litigants use the class action device to circumvent statutes of limitation—creating risk exposure of

indefinite scope and duration for the business community—works no equity.

## CONCLUSION

The Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner*,

v.

MICHAEL H. RESH, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* listed in the Appendix are law professors who teach and write in the field of federal courts, civil procedure, and constitutional law who have an interest in the proper interpretation of equitable tolling and class action doctrine. Indeed, several *Amici* are leading experts regarding tolling in the class action context. *Amici* come together out of a shared belief that the Ninth Circuit correctly held equitable tolling applicable in this successive class action case. *See generally Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

In particular, *Amici* Law Professors conclude that equitable tolling in this case comports with congressional intent regarding 28 U.S.C. § 1658(b)(1), a point not addressed by Petitioner and its *amici*. *Amici* Law Professors also contend that Petitioner and its *amici*'s many securities-law-only-focused arguments fail to account for the transsubstantive nature of Federal Rule of Civil Procedure 23.

## SUMMARY OF ARGUMENT

This case asks whether Congress intended equitable tolling to apply to 28 U.S.C. § 1658(b)(1) in successive class filings. The answer is a resounding "Yes."

**I.A.** "It is hornbook law that limitations periods," such as § 1658(b)(1), "are customarily subject to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from counsel for both petitioner and respondents granting blanket consent to the filing of *amicus* briefs are on file with the Clerk.

equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted). Furthermore, the Court has previously held that Congress intends § 1658(b)(1) be interpreted in light of common law adjudicatory principles, such as equitable tolling doctrine. *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). Petitioner's view, which limits equitable tolling, cannot square with this presumed congressional intent.

**I.B.** Petitioner cannot carry its burden to counter this strong presumption favoring equitable tolling of § 1658(b)(1) for successive class filings. The Court requires the "'clearest command'" from Congress to render a statute immune to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 646 (2010) (citation omitted). Section 1658(b) lacks such a clear command.

**I.C.** Section 1658(b)(2)'s text forestalls Petitioner's primary fear that equitable tolling imposes an infinite regress of successive class action filings upon them. Congress included a five-year statute of repose in § 1658(b)(2). Statutes of repose, like § 1658(b)(2), "are not subject to equitable tolling." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017). Therefore, the statute itself absolutely bars a successive suit five years after § 1658(b)(2) begins to run.

**I.D.1.** Petitioner fails to rebut the conclusion that successive class members act diligently. First, Petitioner erroneously treats diligence as a necessary element of equitable tolling, rather than a consideration to be weighed. *See ANZ Sec.*, 137 S. Ct. at 2052 (treating diligence as a consideration, not an element). This conflation of "considerations" to be weighed with "elements" that must be met undercuts Petitioner's view.

**I.D.2.** Second, Petitioner relies upon *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962), as binding authority for its one-shot approach. *Goldlawr*, however, is a transfer-of-venue opinion. 369 U.S. at 464.

**I.D.3.** Third, Petitioner attempts to construe the happenstance that under the *facts* in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the relevant statute of limitations was tolled so that those plaintiffs could file individual actions into a no-successive-class-filing *rule of law*. "Supreme Court opinions," however, are not limited "precisely to the facts of each case . . . [because] our system of jurisprudence would be in shambles, with litigants, lawyers, and legislatures left to grope aimlessly for some semblance of reliable guidance." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991). Indeed, this Court in *Crown, Cork & Seal* did not limit *American Pipe*'s scope to motions to intervene, which were the particular facts at issue in that case.

**II.A.** Petitioner and its *amici* often rely upon securities-litigation specific contentions in crafting their anti-tolling approach. This constitutes error because the Federal Rules of Civil Procedure are transsubstantive. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1108 (1982). The nature of the Rules, then, renders these securities-specific arguments inapt.

**II.B.** Lastly, if Petitioner and its *amici*'s real position is that class actions have not "benefitted consumers" and "impose significant costs on businesses," DRI Br. 10, they should ask the Civil Rules Advisory Committee to amend Rule 23. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding in a Rules case that "'[w]hatever temptations the statesmanship of policy-making

might wisely suggest,' the judge's job is to construe the statute—not to make it better.") (citation omitted).

## ARGUMENT

### I. CONGRESSIONAL INTENT REGARDING § 1658(b) IS THE FUNDAMENTAL ISSUE HERE AND COMPELS EQUITABLE TOLLING.

This case asks the Court to decide whether and when equitable tolling applies to 28 U.S.C. § 1658(b)(1). Tellingly, Petitioner carefully avoids any mention of § 1658(b)(1) in its argument.[2] Why? Because Petitioner's one-shot approach to class action membership—in which the limitations period set forth in § 1658(b)(1) could not be equitably tolled to allow membership in a successive class, *see, e.g.*, Pet. Br. 23—cannot be squared with the statute. Yet, congressional intent demands the application of equitable tolling principles to the two-year statute of limitations embodied in § 1658(b)(1).

#### A. This Court Strongly Presumes Equitable Tolling Doctrine Applies To § 1658(b)(1) As A Matter Of Congressional Intent.

Congressional intent excludes Petitioner's one-shot approach to equitable tolling for class members. This Court holds that the "basic inquiry" of equitable tolling is one of legislative intent. *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 427 (1965) ("The basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in the given circumstances."); *see also Am. Pipe & Constr. Co. v. Utah*,

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[2] Petitioner cites § 1658 but three times, *see* Pet. Br. 1, 5, 7—all in the background discussion. Never once does Petitioner engage with the statute at issue in this case in the "Argument" section of its brief. Petitioner's *amici* similarly ignore the operable statute in this case.

414 U.S. 538, 557–58 (1974) ("The proper test . . . is whether tolling the limitation in a given context is consonant with the legislative scheme."). This Court determines congressional intent, including intent regarding equitable tolling, with an "interpretive inquiry [that] begins with the text and structure of the statute." *Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001).

The relevant statute is 28 U.S.C. § 1658(b). This statute follows a familiar pattern of pairing a shorter limitations period with a longer repose period. Thus, Congress first crafted a two-year statute of limitations for securities-fraud cases. 28 U.S.C. § 1658(b)(1) ("[A] private right of action that involves a claim of fraud . . . concerning the securities laws . . . may be brought not later than . . . 2 years after the discovery of the facts constituting the violation."); *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (finding the two-year time limit in § 1658(b)(1) a statute of limitation). And next Congress paired subsection (b)(1)'s statute of limitations with a five-year statute of repose. 28 U.S.C. § 1658(b)(2) ("[A] private right of action that involves a claim of fraud . . . concerning the securities laws . . . may be brought not later than . . . 5 years after such violation."); *Merck & Co.*, 559 U.S. at 650 (holding the five-year time limit in § 1658(b)(2) a statute of repose); *see also Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (affirming *Merck & Co.*'s construction of § 1658(b)).

Given its text and structure, this Court should hold § 1658(b) subject to equitable tolling as a matter of congressional intent—contrary to Petitioner's one-shot approach. "It is hornbook law that limitations periods," such as § 1658(b)(1), "are customarily subject to equitable tolling, unless tolling would be

inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted). This hornbook rule follows because Congress "'legislates against a background of common-law adjudicatory principles,'" including "[e]quitable tolling, a long-established feature of American jurisprudence." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)) (alteration omitted).[3]

The hornbook rule applies here. This Court previously held that Congress intends § 1658(b)(1) to be interpreted against the backdrop of common law adjudicatory understandings. In *Merck & Co.*, the Court ruled that when Congress deployed "discovery" in § 1658(b)(1), it intended the common law meaning of the term. 559 U.S. at 648. It follows, *and Petitioner does not contest*, that Congress intended the application of similar common law adjudicatory principles, such as equitable tolling, to the construction of § 1658(b)(1).

### B. Section 1658(b) Lacks The Required Clear Statement Disclaiming Equitable Tolling To Overcome This Strong Presumption.

Petitioner bears the burden to overcome this strong presumption that equitable tolling applies to § 1658(b)(1), whether once or successively. To surmount this strong presumption that Congress intends

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[3] *See also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1636 (2015) (interpreting the statute of limitations' language to allow equitable tolling); *Young*, 535 U.S. at 49–50 ("Congress must be presumed to draft limitations periods in light of this background principle."); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349–50 (1875) (applying equitable tolling to statute of limitation in the bankruptcy code).

equitable tolling to apply, this Court requires great clarity in the statutory text expressing a contrary intent. "[W]e will 'not construe a statute to displace courts' traditional equitable authority absent the 'clearest command.'" *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quoting and applying *Miller v. French*, 530 U.S. 327, 340 (2000), in an equitable tolling case). Section 1658(b) lacks such a clear congressional statement rejecting equitable tolling—an uncontested conclusion that stymies Petitioner's one-shot approach.

Moreover, Congress could well have included such a clear statement, if it intended to reject the traditional common law adjudicatory principle of equitable tolling in either one-off or successive settings. Congress enacted § 1658 in 1990 and reinstated the provision (in amended form, creating subsections (a) and (b)) in 2002. *See* Pub. L. No. 101-650, tit. III, § 313(a), 104 Stat. 5104, 5114 (1990); Pub. L. No. 107-204, tit. VIII, § 804(a), 116 Stat. 800, 801 (2002). Both of these congressional actions occurred well after the Court's decisions in *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), putting Congress on notice as to this Court's jurisprudence regarding equitable tolling in class actions.

Until Congress instructs otherwise, there is nothing in § 1658(b) constituting the "clear statement" this Court requires to overcome the finding that Congress intends equitable tolling apply to § 1658(b)(1). *Cf. United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015) ("[I]n amending [the statute of limitations] four times after its enactment, Congress declined again (four times over) . . . to provide anything like the clear statement this Court has demanded before deeming a statute of limitations to curtail a court's power."). Petitioner does not, *because it cannot*, point the Court to

any congressional clear statement that disclaims application of equitable tolling to § 1658(b)(1), despite the fact that its one-shot approach does not comport with equitable tolling in the class action setting.

### C. Section 1658(b)(2) Bars Petitioner's Imagined Infinite Series Of Successive Class Filings.

Attention to the text also shows that Congress crafted § 1658(b) to address Petitioner's primary fear. Petitioner and its *amici* object to successive tolling of class actions because they suppose class defendants will face an infinite regress of successive class-action filings. *See* Pet. Br. 46–48; DRI Br. 6–11; SIFMA Br. 16–18; Chamber Br. 9–13. Petitioner and its *amici*'s boogeyman arguments err, however, because they ignore the plain text and import of § 1658(b)(2).

The plain text of the statute bars an infinite regress of successive class-action filings. Congress coupled § 1658(b)(1)'s two-year statute of limitations with a five-year statute of repose in § 1658(b)(2). *See Merck & Co.*, 559 U.S. at 650 (holding that § 1658(b)(2) is a statute of repose). This Court recently held that "statutes of repose," like § 1658(b)(2), "are not subject to equitable tolling." *ANZ Sec.*, 137 S. Ct. at 2051. Under no circumstances, then, could class plaintiffs file infinite successive class actions. The statute absolutely bars suits five years after a violation—*a time limit that the courts cannot toll.*

Furthermore, in *Merck & Co.*, this Court rejected a nearly identical argument to Petitioner's. 559 U.S. 633. The defendant in *Merck & Co.* protested against interpreting § 1658(b)(1) in light of the traditional common law adjudicatory principles, and feared that applying such a traditional common law interpretive tool to § 1658(b)(1) would increase costs by subjecting

it to "liability for acts taken long ago." *Id.* at 650; *see also* Pet. Br. 42–45 (asserting that successive tolling will unfairly increase defendants' costs); DRI Br. 18–25 (same); SIFMA Br. 6–10 (contending that successive tolling of class actions encourages more securities suits). This Court easily dismissed this hyperbolic contention by noting that "Congress' inclusion in the statute of an unqualified bar on actions instituted '5 years after such violation,' § 1658(b)(2), giving defendants total repose after five years, should diminish that fear." *Merck & Co.*, 559 U.S. at 650.

The same reasoning controls here. Petitioner's infinite refiling position, leading to ballooning costs, is little more than a scary campfire story. Congress barred just such a result as Petitioner imagines by including a statute of repose. *See Merck & Co.*, 559 U.S. at 650. As such, only a clear statement from Congress prohibiting equitable tolling can stop its application to § 1658(b)(1). *See Kwai Fun Wong*, 135 S. Ct. at 1633; *Holland*, 560 U.S. at 646; *Miller*, 530 U.S. at 340. Petitioner's parade of horribles, ignoring the plain text of § 1658(b)(2) as it does, offers no substitute for the application of the venerable plain-statement rule.

### D. Petitioner Cannot Rebut The Conclusion That Successive Class Members Act Diligently Under *American Pipe*.

#### *1. Petitioner Misconstrues Diligence As An Immutable And Inflexible Element Of Equitable Tolling.*

Petitioner cannot counter the conclusion that equitable tolling applies to § 1658(b)(1) in successive class actions.

As a first attempt to escape this conclusion, Petitioner erroneously presents plaintiff diligence as a

necessary element to toll § 1658(b)(1) in securities cases. *See* Pet. Br. 31 (characterizing *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016), as holding "diligence and extraordinary circumstances . . . 'elements' of equitable tolling that must both be satisfied"). Petitioner's characterization of equitable tolling doctrine tracks the test laid out in *Holland*. 560 U.S. at 649 ("[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing.").

In *Menominee*, however, the Court explicitly stated that "*Holland v. Florida* [was] a habeas case, and we have never held that its equitable-tolling test necessarily applies outside the habeas context." 136 S. Ct. at 756 n.2. The Court continued, "[w]e have no occasion to decide whether an even stricter test [or] . . . a more generous test than *Holland*" could apply outside the habeas context. *Id.* This Court reiterated in *ANZ Securities* that diligence and extraordinary circumstance are "considerations" in the equitable tolling analysis, not necessary elements as Petitioner wrongly frames them. 137 S. Ct. at 2052.

This distinction in application tracks congressional intent. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress sought "to eliminate delays in the federal habeas review process." *Holland*, 560 U.S. at 648. The *Holland* Court, therefore, took an elements approach to diligence in the equitable tolling analysis of AEDPA's statute of limitations, 28 U.S.C. § 2244(d). 560 U.S. at 649. Here, by contrast, Congress predicated its 1995 securities-litigation reforms upon the premise that securities litigation would proceed via class action. *See* 15 U.S.C.

§ 77z-1(a)(1) (limiting key securities-litigation reforms to class actions). Indeed, Congress' key reform, heightened pleading standards, applies only to class actions. *See* 15 U.S.C. § 78u-4(a)(1). Thus, the tolling analysis for the securities-litigation statute of limitation at issue here, § 1658(b)(1), should promote class actions over individual filings by construing diligence as but a consideration, not an element.

This conflation of considerations to be weighed with elements that must be met undercuts Petitioner's view that diligence cannot be found here as a matter of law. Contrary to Petitioner's assumptions, "equity[] resist[s] . . . rigid rules," *Holland*, 560 U.S. at 651, especially in the "fact-intensive disputes" involved in equitable tolling, *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 229 (2012). Following these principles, *American Pipe*'s class action tolling rule aligns well with the purposes of equitable tolling. Indeed, *American Pipe*'s non-rigid approach "demonstrate[s] . . . that a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding." *Smith v. Bayer Corp.*, 564 U.S. 299, 314 n.10 (2011).

2. *Petitioner Wrongly Relies Upon A Transfer-Of-Venue Case In An Attempt To Dodge The* American Pipe *Rule.*

Facing this precedential brick wall, Petitioner acknowledges that diligence is shown for equitable tolling purposes by way of class membership in an initial action. *See* Pet. Br. 34. Petitioner cannot explain, however, why serving as a class member constitutes diligence in a first suit, but not in a successive action.

Indeed, Petitioner and its *amici* cite no binding authority after *American Pipe* for the notion that successive class membership does not constitute diligence.

*See* Pet. Br. 34; Chamber Br. 12–13; DRI Br. 16–17. Rather, Petitioner cites only *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962), as authority for its novel position that successive class membership shows a lack of diligence. *See* Pet. Br. 34.

*Goldlawr*, which predates *American Pipe* by 12 years, is not a successive class action case, or even a one-time class action case. Rather, *Goldlawr* is a transfer-of-venue opinion, addressing whether a district court lacking personal jurisdiction may transfer a suit pursuant to 28 U.S.C. § 1406. 369 U.S. at 464. In short, *Goldlawr* does not stand for the "successive tolling equates to a lack of diligence" proposition Petitioner asserts.

*3. Petitioner Mistakenly Presents The Facts Of* Crown, Cork & Seal *As A Rule Of Law.*

In lieu of an argument on the law, Petitioner makes much of the happenstance that in *Crown, Cork & Seal* the relevant statute of limitations was tolled so that those particular plaintiffs could file individual actions. *See* Pet. Br. 26, 28–31, 34, 38, 45, 47. This Court has also noted those facts when alluding to *American Pipe* and *Crown, Cork & Seal*. *See ANZ Secs.*, 137 S. Ct. at 2054–55; *Bayer Corp.*, 564 U.S. at 313 n.10; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990).

But this Court's holdings are seldom limited to the precise facts of the case in which the rule was delivered as Petitioner supposes. Indeed, "Supreme Court opinions [are not limited] precisely to the facts of each case . . . [because] our system of jurisprudence would be in shambles, with litigants, lawyers, and legislatures left to grope aimlessly for some semblance of reliable guidance." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991); *see also Am. Civil*

*Liberties Union of Ky. v. McCreary County*, 607 F.3d 439, 447 (6th Cir. 2010) (adopting *McCoy*); *Oyebanji v. Gonzales*, 418 F.3d 260, 265 (3d Cir. 2005) (same); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (same); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (same).

Following the principle that the Court's opinions generally are not limited to their precise facts, this Court in *Crown, Cork & Seal* did not limit *American Pipe*'s scope to motions to intervene. Nor should the Court today narrowly limit equitable tolling to the facts presented in *Crown, Cork & Seal*, because, just as in *Crown, Cork & Seal*, the *principles* undergirding *American Pipe* continue to apply.

* * *

There is no room for doubt. Congressional intent wholeheartedly supports application of equitable tolling doctrine to § 1658(b)—a conclusion incompatible with Petitioner's one-shot approach to tolling class actions.

## II. THE TRANSSUBSTANTIVE NATURE OF RULE 23 VOIDS PETITIONER'S MANY SECURITIES-LAW-FOCUSED CONTENTIONS.

**A.** As *Amici* Law Professors demonstrate above, this case presents the Court with a question of congressional intent regarding § 1658(b)(1). Petitioner and its *amici*, however, frame this case as a Federal Rule of Civil Procedure 23 issue. *See* Pet. Br. 35–42; Chamber Br. 17–19; DRI Br. 11–14; SIFMA 11–18. Even if this Court approaches this suit fundamentally as a Rule 23 question, Petitioner and its *amici*'s arguments fail.

Petitioner and its *amici*'s Rule 23 arguments err when they rely upon securities-litigation-specific

contentions. *See, e.g.*, Pet Br. 36–37 (arguing that there is a particular lack of diligence for successive class members in securities litigation); DRI Br. 6–11 (asserting that successive tolling amounts to unfair betting by securities-fraud plaintiffs); SIFMA Br. 6–10 (speculating that successive tolling encourages securities suits); WLF Br. *passim* (making various policy assertions regarding securities-fraud suits). These arguments' unspoken premise is that this Court construes Rule 23 differently depending on the subject matter of the litigation. On the contrary, Rule 23 is a general procedural rule, not a subject-specific rule. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) ("Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met.").

Indeed, all of the Federal Rules of Civil Procedure are transsubstantive. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1108 (1982); Charles E. Clark & James William Moore, *A New Federal Civil Procedure I, The Background*, 44 YALE L.J. 387, 388–89 (1935). As such, this Court does not vary Rule 23 interpretations for securities cases or any other substantive area of the law. Instead, Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 559 U.S. at 398; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (rejecting the notion that the interpretation of Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applies only to complex anti-trust cases: "Rule [8(a)(2)] in turn governs the pleading standard in all civil actions .... Our decision in *Twombly* expounded the pleading standard for all civil

actions.") (internal citations and quotation marks omitted).

As such, Petitioner and *amici* err by assuming that securities-law-focused arguments provide a reason to reject the generally applicable *American Pipe* rule. Adopting any other result would be inconsistent with the very notion that the Rules are transsubstantive and, if followed, would lead the Court into an abyss of never-ending factual and substantive law variations, all in the guise of interpreting Rule 23 in one context and then the other. *Cf.* Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 GEO. MASON L. REV. 339, 349 (2016) (discussing the appropriate application, and necessity, of *American Pipe* tolling to successive class filings in the wake of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)—a de-certified, nationwide, employment-law class action). Indeed, this Court's commitment to crafting a general set of rules unrelated to substantive law places it in the stronger position of "avoiding 'interest group' politics," exactly of the stripe seen here. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 303–04. As such, the Court should reject Petitioner's invitation to backtrack on its commitment to transsubstantive application of the Rules.

**B.** Finally, if Petitioner and its *amici*'s real position is that class actions have not "benefited consumers" and "impose significant costs on businesses," DRI Br. 10, there is a rulemaking process available for them to seek amendments to the rules. This Court, however, should not be beguiled into amending Rule 23 under the ruse of interpretation.

As the Court has often noted, the rulemaking process is the more appropriate setting for instituting

policy-based amendments to the Rules. "[T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar, see 28 U.S.C. §2073, and it facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009).

Moreover, policy change by way of rulemaking better comports with congressional intent than does policy change by judicial decision. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995) (recognizing a congressional preference for rulemaking in the context of the finality rule for appellate jurisdiction); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1141–52 (2002) (arguing that the terms of delegated rulemaking authority in the Rules Enabling Act limit Rule amendment power to the rulemaking process). Furthermore, Congress itself plays an important role in the rulemaking process. *See* 28 U.S.C. § 2074(a); *Shady Grove*, 559 U.S. at 400 ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure . . . ."). The Court, as such, does not substitute the policy preferences of a party, or an *amicus*, for that of Rules Advisory Committee or Congress. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding in a Rules case that "'[w]hatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute—not to make it better.") (citation omitted).

These points especially apply when, as here, arguments rest largely upon legislative facts. *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1217 (2012). Petitioner and *amici* make broad empirical claims about

financing securities lawsuits, *see* Pet. Br. 44; incentives to settle, *see* Pet. Br. 44, SIFMA Br. 10–11; judicial burdens, *see* Chamber Br. 19–20, DRI Br. 25–27; and costs to the business community, *see* DRI Br. 18–25. Whether Petitioner's arguments are viable largely depends upon empirical matters such as statistical rates of settlement after de-certification and similar determinations. These arguments more appropriately sound before the Civil Rules Advisory Committee.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# APPENDIX

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No. 17-432

IN THE
# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner,*

v.

MICHAEL H. RESH, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS


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## QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. The question presented is:

Whether plaintiffs whose individual claims are timely as a result of *American Pipe* tolling may also bring those claims in a subsequent class action on behalf of all class members who also had timely claims under the *American Pipe* rule?

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## INTEREST OF THE AMICUS

This brief is submitted on behalf of the National Conference on Public Employee Retirement Systems ("NCPERS").[1]

NCPERS is the largest national, non-profit public-pension trade association, with a membership that includes over 500 pension funds representing in excess of $3 trillion in assets providing retirement benefits to millions of American public servants. For more than half of the country's teachers and more than two-thirds of its police officers and firefighters, who are statutorily excluded from the Social Security system, these pensions provide the principal source of retirement security.[2] Since 1987, more than 60% of public pension funds' revenue has come from returns on their investments.[3] When retirement systems like those represented by the amicus are the victims of securities-law violations, the resulting loss of asset value and revenue must be made up by the sponsoring governments, and ultimately, by the taxpayers.

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[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* 42 U.S.C. § 410(a)(7) (generally excluding State employees from coverage by Social Security, except as provided by Federal-State agreements under § 418); 42 U.S.C. § 418(d) (generally excluding State employees who are covered by State retirement systems from Federal-State agreements for Social Security coverage of State employees).

[3] *See* Nat'l Ass'n of State Ret. Administrators, *NASRA Issue Brief: Public Pension Plan Investment Return Assumptions* (updated Feb. 2018) (citing U.S. Census Bureau data), https://www.nasra.org/files/Issue%20Briefs/NASRAInvReturnAssumptBrief.pdf.

Since 1941, NCPERS has worked to protect the pensions of public employees. Because of NCPERS' interest in preserving retirement benefits for public employees, it is very concerned about fraudulent practices in the securities industry and the nation's capital markets. NCPERS recognizes the need to combat securities fraud and restrain corporate excess and appreciates the role of private securities class actions in providing a means to deter corporate wrongdoing and compensate victims of securities fraud.

NCPERS believes that the tolling of the statute of limitations by the filing of one class action should permit absent class members to file a subsequent class action after denial of class certification in the first action. This issue is important for public pension funds because under the Supreme Court's longstanding *American Pipe* tolling doctrine, they are entitled to rely on the filing of the first class action to prevent their claims from being barred by the statute of limitations, and if class certification is denied in the first action, they are then able to decide whether to file individual actions. However, in many cases, many funds' losses (and, of course, individual investors' losses) are too small to justify litigating individual actions. In those cases, it is important and just for class members to be able to aggregate their indisputably timely claims as a subsequent class action in order to achieve the economies of scale and cost-savings of a class action. To deny them this right would force class members to file duplicative class-action complaints before the running of the limitations period, imposing unnecessary burdens and expenses on the parties and the courts. If the grounds on which class certification was denied in the first action (or on which the first action was dismissed without a class-certification decision) apply to the subsequent action, class members are unlikely to file a futile subsequent action. In the

unlikely event that they do, the principles of comity and stare decisis will amply protect defendants.

## SUMMARY OF ARGUMENT

**I.A.** Absent class members are entitled to rely on the filing of a class action to protect their rights unless and until class certification is denied. Under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), class members are specifically entitled to rely on a class action to keep their own individual claims and all class members' claims from being barred by the statute of limitations until class certification is denied. At that point, all class members are entitled to bring their individual claims before the newly running limitations period expires. But many class members' individual claims are too small to litigate separately, and permitting them to aggregate their claims in a subsequent class action is appropriate where the Rule 23 deficiency of the first action is curable.

**B.** Absent *American Pipe*, class members with claims too small to be litigated individually will be compelled to file duplicative class actions before the limitations period expires in order to protect their rights in case the proposed class representative in the first action fails to achieve class certification. These duplicative filings will burden the parties and the courts and are contrary to, and unnecessary under, Rule 23 and *American Pipe*.

**II.** In securities cases, permitting a subsequent class action to seek to cure the Rule 23 deficiencies of the first class action is consistent with the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which seeks to avoid duplicative actions by concentrating all related litigation under the control of a single court-appointed lead plaintiff. Denying *American Pipe* tolling of a subsequent class action would undermine the

PSLRA's effort to place control of securities class action in one lead plaintiff's hands at a time.

**III.** This Court's decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2041 (2017) ("*CalPERS*"), holding that the statute of repose under the Securities Act of 1933 is an absolute bar to any subsequently filed action, makes the "perpetual tolling" lamented by Petitioner and its amici a total fiction. The existence of some cases in which there is a short window between denial of class certification in a first action and expiration of the statute of repose, during which class members may seek to cure the first action's Rule 23 deficiency, is entirely appropriate to protect class members' rights and does not unfairly prejudice defendants, whose rights under the statute of limitations are fully protected by the filing of the first action.

**IV.** Congress, this Court, and scholars recognize that securities class actions play a vital role in enforcing the securities laws, compensating defrauded investors, deterring fraud, and maintaining efficient capital markets. The laments by Petitioner and its amici about supposed evils of securities class actions were all thoroughly addressed by Congress in the PSLRA.

## ARGUMENT

### I. CLASS MEMBERS ARE ENTITLED TO RELY ON THE FILING OF A CLASS ACTION TO PRESERVE THEIR CLAIMS AND TO AGGREGATE THEIR TIMELY CLAIMS WHERE THE FIRST ACTION'S RULE 23 DEFICIENCY IS CURABLE

The *American Pipe* rule is part of a sound structure of class and individual litigation. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The basic princi-

ple of class litigation is that those who bring class actions act on behalf of the class, and the putative class members need not appear or participate in the action to protect their legal rights. The *American Pipe* rule fulfills that principle by eliminating the need—which is particularly pressing for institutional investors that sometimes have large stakes in the action and always have fiduciary duties to their beneficiaries—to engage in wasteful protective efforts and litigation that will all prove unnecessary if class certification is granted. Thus, *American Pipe* protects absent class members by assuring them that their claims will not be barred by the statute of limitations if class certification is denied.

But many class members' timely individual claims—including the vast majority of individual investors' claims and many institutional investors' claims—will be too small to litigate except as a subsequent class action, consistent with the purposes of Rule 23. "The very premise of class actions is that 'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *CalPERS*, 137 S. Ct. at 2054 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)). Accordingly, applying *American Pipe* to a subsequent class action promotes Rule 23's purpose of permitting the aggregation of timely claims that are too small to litigate individually: "tolling as allowed in *American Pipe* may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control." *Id.* at 2055.

Applying *American Pipe* to a subsequent class action also avoids the need for class members to file duplicative class-action complaints before the limitations period expires in order to protect their rights in case the

plaintiff in the first action does not achieve certification. Absent class members cannot anticipate the various reasons why the first action might not be certified, such as the plaintiff's lack of standing, the plaintiff's decision to settle or voluntarily dismiss the first action before any decision on class certification, or curable Rule 23 deficiencies. As the Court held in *Crown, Cork*, without *American Pipe* tolling of subsequent individual actions, "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." 462 U.S. at 350-51. The exact same logic applies to a putative class member whose claim is too small to litigate individually—he or she would have every incentive to file a separate class action prior to the expiration of the limitations period in case the class was not certified in the first action for any of the various possible reasons. And "[t]he result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. *See also CalPERS*, 137 S. Ct. at 2051 ("Without the tolling, potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable, which would breed needless duplication of motions.") (citation and quotation marks omitted); *Am. Pipe*, 414 U.S. at 551 ("To hold to the contrary would frustrate the principal function of a class suit" by encouraging "precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available means for the fair and efficient adjudication of the controversy'") (quoting Rule 23(b)(3)); *id.* at 553-54 ("a rule requiring the successful anticipation of the determination of the viability of the class would breed needless duplication of motions").

Thus, applying *American Pipe* in this context promotes Rule 23's additional purpose of saving the time and resources of the putative class members, the other parties to the case, and the judicial system itself.

The prospect of multiple protective filings if China Agritech's proposed rule is adopted here is very real, as was demonstrated by the profusion of protective filings in response to the adoption, first by the Second Circuit and then by this Court, of the rule that *American Pipe* does not apply to the Securities Act's three-year statute of repose.[4] For example, in the recently settled *Petrobras* securities-fraud class action in the Second Circuit, approximately 500 institutional investors (and their managed funds and accounts) filed individual actions that are proceeding separately from the class action. *See Univs. Superannuation Scheme Ltd. v. Petróleo Brasileiro S.A.-Petrobras*, 2016 WL 3971814, Brief of Defendants-Appellants Petróleo Brasileiro S.A.-Petrobras, et al., at *6 (2d Cir. filed July 21, 2016). These institutional investors were obligated to file individual actions because the class period in the *Petrobras* case was five-and-a-half years long—January 2010 to July 2015. *See In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 357 (S.D.N.Y. 2016). The class was not certified, however, until February 2016, more than six years after the start of the alleged fraud. *See id.* As a result, there was a serious risk that the three-year and five-year repose periods for claims under the Securities Act and the Securities Exchange Act of 1934, respectively, would expire before the class was certified. Indeed, some institutional investors that filed individual actions had their Securities Act and Exchange Act claims dismissed for that reason as

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[4] *See CalPERS*, 137 S. Ct. 2042 (2017); *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).

a result of the Second Circuit's intervening decision in *IndyMac*. *See In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 198-99 (S.D.N.Y. 2016). But hundreds of others filed timely individual actions.

The same proliferation of protective filings has occurred in other cases as well. For example, at least 27 individual actions have been filed in 2016–2018 alongside a pending securities class action against Valeant Pharmaceuticals International, Inc. in the District of New Jersey; at least 18 individual actions were filed in 2014–2015 alongside a securities class action against BP plc in the Southern District of Texas; and at least 13 individual actions were filed in 2015–2017 alongside a securities class action against American Realty Capital Properties in the Southern District of New York. In both the *Valeant* and *American Realty* cases, these protective filings were filed before a decision on class certification in the related class action.[5]

Thus, the multiplication of individual actions as a result of *American Pipe*'s inapplicability to statutes of repose has already occurred. *See also* David Freeman Engstrom & Jonah B. Gelbach, *American Pipe Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 Stan. L. Rev. Online 92 (2017) (correctly predicting that this Court's adoption of the *IndyMac* rule in *CalPERS* would result in numerous protective

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[5] The *Valeant*, *BP*, and *American Realty* opt-out actions are listed in Appendix A. The *American Realty* opt-out cases were filed between January 2015 and April 2017, and the related class action was certified in August 2017. *See In re Am. Realty Capital Props., Inc.*, 2017 WL 3835881 (S.D.N.Y. Aug. 31, 2017). In *Valeant*, the district court has denied defendants' motions to dismiss in large part and denied a defendant's motion for reconsideration, and the plaintiffs have not yet moved for class certification. *See In re Valeant Pharms. Int'l, Inc., Sec. Litig.*, 2017 WL 1658822 (D.N.J. Apr. 28, 2017), *reconsideration denied*, 2017 WL 3880657 (D.N.J. Sept. 5, 2017).

filings because many class-certification decisions are delayed for years). If the Court adopts China Agritech's position here, the same logic will compel class members with losses too small to litigate individually to file protective class actions before the running of the statute of limitations. And if a subsequent class action satisfies Rule 23's requirements, it is more efficient for the parties and the courts to litigate a single class action rather than a multitude of individual actions. *See Crown, Cork*, 462 U.S. at 350-51; *Am. Pipe*, 414 U.S. at 553-54.

Importantly, the Court in *CalPERS* reaffirmed *American Pipe*'s holding that while statutes of repose do not permit equitable tolling, equitable tolling is "in accord with 'the functional operation of a statute of limitations'" because "[b]y filing a class complaint within the statutory period, the named plaintiff 'notified the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *CalPERS*, 137 S. Ct. at 2051 (quoting *Am. Pipe*, 414 U.S. at 554-55).

China Agritech and its amici argue that *American Pipe* applies only to those class members who have exercised "diligence," and that the only way a class member can show diligence is to file its own individual claim. *See* Petitioner's Br. at 18-19. They say that any class members that do not file their own claims have "slept on their rights." *Id.* at 28. But this Court has held that the first class action benefits all putative class members and satisfies the burden of diligence for all class members. Thus, in *American Pipe*, the Court held that "the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." 414 U.S. at 551. And the Court went on to hold that this result did

not depend on class members' active participation in the class suit:

> We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit. Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action.

*Id.* at 551-52.

Moreover, the Court held that class members have no duty to take any action regarding their claims until class certification is denied:

> Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.

*Id.* at 552. Likewise, the Court held in *Crown, Cork* that "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." 462 U.S. at 352-53.

Thus, a class action is a true representative action, and someone who is a putative class member has not slept on her rights by not filing her own action before

class certification is denied or the complaint is dismissed in the first class action, because she is entitled to benefit from the first action. Public pension funds and other institutional investors, as well as individual investors, have relied for decades on *American Pipe* tolling in this way. To make tolling of the statute of limitations unavailable to class members whose claims are too small to litigate individually would be contrary to this Court's precedents and to Rule 23. China Agritech's whole theory is at odds with how class actions operate, as explained in *American Pipe* and *Crown, Cork*.

## II. PERMITTING SUBSEQUENT CLASS ACTIONS IS CONSISTENT WITH THE PSLRA

According to China Agritech and its amici, even though their proposed rule incentivizes duplicative class actions, this is acceptable because a single duplicative class action would preserve absent class members' rights without any need for tolling. *See* Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner, at 15-16. This argument fails, because other class members are no better able to assess the adequacy of any duplicative filer than they are to assess the court-appointed lead plaintiff's adequacy. Thus, any class member that is concerned about preserving its right to aggregate its claims in a class action if other proposed representatives are rejected by the court has a strong incentive to file its own class-action complaint before the limitations period expires. This incentive for duplicative filings is contrary to Rule 23 and *American Pipe*.

In addition to improperly incentivizing duplicative actions, Petitioner and its amici's argument gets the PSLRA backward. The whole point of the PSLRA's lead-plaintiff process is to centralize all efforts into a single class action led by a single lead plaintiff (or a

small, cohesive lead-plaintiff group) as soon as possible, precisely to prevent duplicative class efforts. *See Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82-83 & n.13 (2d Cir. 2004). Thus, the statute directs courts first to consider any motion to consolidate similar class actions before considering motions for appointment as lead plaintiff. *See* 15 U.S.C. §§ 77z-1(a)(3)(B)(ii), 78u-4(a)(3)(B)(ii).

Also, because the PSLRA directs the court to presumptively pick the plaintiff with the largest financial interest as the most adequate, *see* 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I), 78u-4(a)(3)(B)(iii)(I), there is little reason for a small investor to try for lead-plaintiff status knowing that larger investors are likely to seek appointment as lead plaintiff.

Furthermore, the PSLRA gives control of the litigation to the court-appointed lead plaintiff, leaving absent class members and even named plaintiffs and proposed class representatives other than the lead plaintiff under the lead plaintiff's control. *See Hevesi*, 366 F.3d at 82-83 & n.13. For all of these reasons, Petitioner and its amici are wrong in asserting that incentivizing duplicative filings before the limitations period runs is consistent with the PSLRA.

China Agritech and its amici also argue that permitting a subsequent class action after denial of class certification in the first action would make it too difficult to settle class actions because of the possibility of a later class action, but this makes no sense. The court-appointed lead plaintiff in the first action has the authority to settle the action on behalf of the entire class, subject to court approval, and any settlement invariably—at defendants' understandable insistence—includes a broad release of all claims that were or could have been asserted in the case. Defendants invariably insist on global peace in exchange for a settlement. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516

U.S. 367, 382 (1996) (holding that settlement may release claims based on same facts and different legal theory); *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *12-13 (S.D.N.Y. Nov. 12, 2004) (approving settlement that released all claims class members could have brought against defendants relating to WorldCom securities and overruling objection to breadth of release). Thus, the only avenue for class members to challenge a settlement negotiated by the court-appointed lead plaintiff in the first class action is to object to court approval of the settlement (and to appeal if the court grants approval). Any subsequent class action asserting claims that were or could have been asserted in the first class action will be barred by the court-approved release in the settlement of the first action.

## III. THERE IS NO POSSIBILITY OF "PERPETUAL TOLLING" IN SECURITIES CLASS ACTIONS

In securities litigation, the concern about endless class actions is nonexistent because *CalPERS* now makes the statute of repose an absolute outer limit. Thus, the repeated invocation by China Agritech and its amici of the supposed evil of "perpetual tolling" is a straw man. *See* Petitioner's Br. at 43, 46-47; Sec. Indus. & Fin. Mkts. Ass'n Br. at 2, 6, 9, 20. This Court held in *CalPERS* that the three-year statute of repose applicable to claims under Sections 11 and 12 of the Securities Act is an absolute bar, *see* 137 S. Ct. at 2055, and lower courts have held that *CalPERS* also governs the five-year statute of repose applicable to claims under Section 10(b) of the Exchange Act and Securities and Exchange Commission Rule 10b-5, *see N. Sound Capital LLC v. Merck & Co.*, 702 F. App'x 75, 77, 81 (3d Cir. 2017) (unpublished opinion).

It is true, of course, that class certification is denied in some securities actions when the one-year statute of limitations under the Securities Act or the two-year statute of limitations under the Exchange Act has run, but the applicable statute of repose has not. And this is the category of cases for which the Court's decision in this case will matter. But China Agritech and its amici are wrong to assert that there is something improper about the existence of some cases in which subsequent class actions would be possible during the narrow window between the denial of certification in the first action and the running of the repose period. This is precisely the category of cases in which it is entirely proper for class members with claims too small to litigate individually to have an opportunity to cure the Rule 23 deficiencies of the first action.

## IV. CONGRESS AND THIS COURT HAVE RECOGNIZED THAT SECURITIES CLASS ACTIONS CONTRIBUTE TO STRONGER MARKETS

Rather than confronting the injustice and practical problems inherent in preventing absent class members with indisputably timely individual claims from proceeding on a class basis when their individual claims are too small to litigate individually and the Rule 23 problems in the prior action are curable, China Agritech and its amici devote much of their briefing to the purported evils of securities litigation and the supposed need to protect corporations from "extortionate" settlements. *See* Washington Legal Foundation Br. at 9, 23-28.

The most obvious response is that Congress disagrees. Faced with precisely these arguments in 1995, Congress passed the PSLRA, which instituted several measures to curb abusive lawsuits and reduce undue pressures to settle. In addition to imposing heightened

pleading standards and staying discovery until the complaint has survived motions to dismiss, the PSLRA also limits defendants' joint and several liability, thus significantly reducing their exposure to damages. *See* 15 U.S.C. § 78u-4(f). It also requires plaintiffs to prove loss causation, so that defendants will not be liable for price declines unrelated to the fraud, and limits damages in cases where the market quickly rebounds after a negative disclosure. *See* 15 U.S.C. §§ 78u-4(b)(4), 78u-4(e). It also provides special protections for "forward-looking statements." 15 U.S.C. § 78u-5. And, to strengthen the role of institutional investors, it added new procedures for selecting lead plaintiffs. *See* 15 U.S.C. § 78u-4(a)(3). These provisions have succeeded both in increasing the number of weak cases that are dismissed, as discussed below, and in increasing recoveries for investors in meritorious cases that survive the PSLRA's new hurdles.[6]

Thus, if China Agritech and its amici believe that, despite the PSLRA, investor plaintiffs still hold too much power over corporate defendants, their complaints are better directed to Congress.

This Court has also repeatedly recognized that securities class actions play a vital role in enforcing the securities laws. In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), the Court noted that "the

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[6] The rate of institutional participation as lead plaintiffs has increased since the PSLRA was passed, and institutional plaintiffs are associated with larger recoveries for class members and lower attorneys' fees. *See* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* 39 (2018); NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2011 Year-End Review* 19 (2011); C. S. Agnes Cheng, et al., *Institutional Monitoring Through Shareholder Litigation*, 95 J. Fin. Econ. 356, 358-60 (2010); Jill E. Fisch, *The Overstated Promise of Corporate Governance*, 77 U. Chi. L. Rev. 923, 938 (2010).

availability of private securities fraud actions" is important for "maintain[ing] public confidence in the marketplace . . . by deterring fraud . . . ." *Id.* at 345 (citing *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986)). Similarly, in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), the Court held that requiring securities-fraud plaintiffs to prove direct reliance on defendants' misrepresentations, as in common-law fraud cases, would prevent class actions and block a path for recovery from fraud that helps to ensure public trust in the financial markets. *See id.* at 2185. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), this Court reaffirmed its "conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Id.* at 320 n.4 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006)). Indeed, "the effectiveness of the securities laws" depends "in large measure on the application of the class action device." *Yang v. Odom*, 392 F.3d 97, 109 (3d Cir. 2004) (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985)).[7]

More fundamentally, the notion of class certification being used to coerce defendants into settling frivolous

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[7] Professors Hillary A. Sale and Robert B. Thompson conclude that *Dura*, *Amgen*, and the two *Halliburton* decisions "reaffirm the foundation of *Basic* that class actions are a core part of securities regulation and, importantly, Basic's conclusion that adaptations to the common law of reliance through market intermediation and the fraud-on-the-market presumption are necessary if class actions are to have the effective deterrence role the Court supports." Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, Georgetown Law Faculty Publications and Other Works No. 1526, at 18 (2015), http://scholarship.law.georgetown.edu/facpub/1526.

claims has been thoroughly debunked. This Court rejected this notion in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), holding that Congress adequately addressed any such concern that existed before 1995 when it adopted the PSLRA. *See id.* at 1202. Scholars have also rejected this notion. *See, e.g.*, Sale & Thompson, *supra*, at 15; Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 Harv. L. Rev. 438, 448-455 (1994); Geoffrey Miller, *Access to Justice: Investor Suits in the Era of the Roberts Court: A Modest Proposal for Securities Fraud Pleading after Tellabs*, 75 Law & Contemp. Probs. 93, 99 (2012). A 1996 study for the Advisory Committee on Civil Rules concluded that "there were *no* objective indications that settlement was coerced by class certification," and that attempted strike suits were adequately addressed via dismissals on the pleadings or at summary judgment, *without* settlement. Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 90 (Federal Judicial Center 1996) (emphasis added).[8]

In any event, whatever concerns one might have had about frivolous securities litigation in the past, these

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[8] *See also* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 Ariz. L. Rev. 497, 503-04 (1997); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2080-84 (1995); Leonard B. Simon & William S. Dato, *Legislating on a False Foundation: The Erroneous Academic Underpinnings of the Private Securities Litigation Reform Act of 1995*, 33 San Diego L. Rev. 959, 990-93 (1996).

have been addressed by the PSLRA. Since then, securities claims have been dismissed at much higher rates, and those rates climb year after year. *See* NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* 23 (2018) (reporting that about a third of cases filed in 2000–2002 were dismissed and more than half of cases filed in 2009–2011, the most recent years with substantial resolution data, were dismissed);[9] Michael Klausner, Jason Heglund & Matthew Goforth, *When Are Securities Class Actions Dismissed, When Do They Settle, and for How Much?—An Update* 1, 3 (PLUS Journal, Apr. 2013; Stanford Law and Economics Olin Working Paper No. 445; Rock Center for Corporate Governance at Stanford University Working Paper No. 145), http://ssrn.com/abstract=2260831 (finding that almost 40% of securities class actions filed between 2006 and 2010 were dismissed on the pleadings); Stephen J. Choi, et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. Empirical Legal Stud. 35, 48 (2009) (comparing dismissal rates pre- and post-PSLRA); Christine Hurt, *The Undercivilization of Corporate Law*, 33 Iowa J. Corp. L. 361, 389 (2008) (same). As the Fifth Circuit put it, with retired Justice O'Connor sitting by designation, "to be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (per curiam).[10]

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[9] These figures include claims filed under Section 11 of the Securities Act, which does not have scienter, loss-causation, or reliance requirements. The rate of dismissal for Section 10(b) claims is likely much higher.

[10] *See also* Hurt, *supra*, at 387, 402 ("the pleading and evidentiary burden on plaintiffs in [securities fraud] civil cases is quite high, and a large number of cases are dismissed prior to discovery

Notably, the district court here denied China Agritech's motions to dismiss the *Dean* and *Smyth* cases. Thus, there is no dispute that the investor plaintiffs here satisfied the PSLRA's stringent pleading requirements, and permitting a subsequent class action would not be opening the door to a strike suit.

There is every reason to believe that the PSLRA's heightened pleading standards will continue to be enforced, as the increasing dismissal rates identified in NERA's 2017 Report confirm. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* 23 (2018) ("the rate of case dismissal has steadily increased").

At the same time, scholars have documented how securities class action litigation improves corporate governance. Class action lawsuits deter aggressive financial reporting both at the targeted firm and—more interestingly—even at peer firms in the same industry. *See* Jared N. Jennings, Simi Kedia, & Shivaram Rajgopal, *The Deterrent Effects of SEC Enforcement and Class Action Litigation* (December 2011), http://ssrn.com/abstract=1868578. One study found that "these lawsuits appear to change firm behavior towards better governance, greater focus, and lower overinvestment." Brian Carson McTier & John K. Wald, *The Causes and Consequences of Securities Class Action Litigation*, 17 J. Corp. Fin. 649, 663 (2011), while another concluded that "institutional investors' involvement in securities litigation enhances . . . the quality of the defendant firms' corporate governance. In light of the ineffectiveness of tra-

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at the pleading stage . . . . To increase the level of specificity that plaintiffs must know and plead but to block the same plaintiffs from any information-producing discovery creates a catch-22 situation that few can surmount . . . .").

ditional institutional monitoring channels (e.g., private communication and filing proposals, etc.) and the increasing number of securities litigations, institutional investors could use litigation as a mechanism to discipline management and to secure the long-term health of the firms." Cheng, *supra*, at 381; *see also* Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 Am. Crim. L. Rev. 1459, 1470 (2009) ("Studies show that private civil suits may also be more effective in regulating financial markets than public enforcement . . . .").

Private securities fraud class actions also serve as a necessary complement to public enforcement by the SEC. The SEC relies on ex post enforcement actions—both private and public—to regulate the markets, rather than directly regulating business transactions themselves ex ante. *See* Samuel Issacharoff, *Regulating After the Fact*, 56 Depaul L. Rev. 375, 379 (2007). An ex post model is particularly suited to private enforcement, *see id.* at 381-82, and—compared to countries that use ex ante regulation—contributes to freer, better developed markets, *see id.* at 376-77, 385. Given that "'[t]he resources of the [SEC] are adequate to prosecute only the most flagrant abuses,' private litigation mechanisms . . . may often be needed to prevent a noninsignificant amount of misconduct from escaping regulation." J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1159-60 (2012) (quotation marks omitted).

More broadly, by deterring fraud and promoting investor confidence in American capital markets, securities class actions contribute to our nation's economic health:

> [C]lass actions . . . function as a necessary and effective deterrent of misconduct that adversely affects the market as a whole.
>
> ***
>
> Securities fraud, if unchecked, creates a market in which no one, not offerors, buyers, or sellers, wants to participate. Simply put, fairness, and the belief in it, matters to market participants and, thus, to growth and innovation.
>
> ***
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> Class actions . . . play an important role in policing and protecting the market and ensuring its strength. The market works to allocate capital from investors to users. Issuers rely on the market, and indirectly, its efficiency and intermediation, to access capital. Capital allocation, in turn, supports growth and innovation, but only when belief in the market's fairness is sustained.
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> Viewed through the publicness lens, then, class actions play not just a direct, investor protection role, they also play a larger role in policing and supporting the market, which in turn fuels growth and innovation.

Sale & Thompson, *supra*, at 43-44.

Securities class actions, subject to the limitations already placed by the PSLRA, thus continue to play a critical role in the enforcement of the securities laws and investor protection, including the protection of American public servants' retirement security.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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## Appendix A

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| *T. Rowe Price Growth Stock Fund, Inc. et al. v. Valeant Pharm. Int'l Inc., et al.*, No. 3:16-cv-05034 (D.N.J.) |
| *Equity Trustees Ltd. ex rel. A T. Rowe Price Global Equity Fund, et al. v. Valeant Pharm. Int'l, Inc., et al.*, No. 3:16-cv-06127 (D.N.J.) |
| *Principal Funds, Inc., et al. v. Valeant Pharm. Int'l, Inc., et al.*, No. 3:16-cv-06128 (D.N.J.) |
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| *Pentwater Equity Opportunities Master Fund Ltd., et al v. Valeant Pharm. Int'l, Inc. et al.*, No. 3:17-cv-07552 (D.N.J.) |
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No. 17-432

# In The Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner,*

v.

MICHAEL H. RESH, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF PLAINTIFFS IN POST-*DUKES* SUCCESSOR CLASS ACTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are women who were members of the former national class challenging sex discrimination at Wal-Mart Stores, in which certification was reversed by the decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As these women were members of the original national class, the limitations period governing their claims was tolled pursuant to *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). *Amici* are plaintiffs in three successor cases who have sought to pursue their claims collectively under Federal Rule of Civil Procedure 23. While there is no dispute that *American Pipe* tolling would apply to their claims were they pursued individually, the timeliness of their claims has been challenged because they have elected to bring sex discrimination claims in more narrowly-framed regional cases brought as class actions.

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[1] Pursuant to this Court's Rule 37.3, counsel for petitioners and respondents have both granted blanket consent to the filing of all *amicus* briefs in letters on file with the Clerk of the Court. Pursuant to this Court's Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel have made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

In *Dukes*, 564 U.S. 338, this Court reversed certification of a national class of women who alleged that Wal-Mart engaged in gender discrimination against female employees when making pay and promotion decisions throughout the country. The Court's decision was primarily based on a finding that the plaintiffs had failed to present sufficient evidence to justify certification of a national class, but left open the possibility that one or more differently-framed classes could be certified if they satisfied the newly-clarified requirements of Rule 23. On remand, former members of the *Dukes* class filed five more narrowly-defined class cases, each challenging discriminatory policies and practices within separate regions of Wal-Mart's operations.

In framing these successor class cases, the plaintiffs sought to address the deficiencies that this Court found to have been obstacles to class certification. First, rather than proceeding as a national class, the proposed classes are each limited to discrete regions of Wal-Mart's operations, following this Court's observation that the challenged practices may have varied by region. *Id.* at 359-60. Second, rather than challenge the exercise of broad discretion itself in the pay and promotion decisions, which this Court found did not qualify as an employment practice susceptible to challenge, *id.* at 355, the successor class plaintiffs challenge discrete employment practices and the decisions of a defined group of managers who made, and were responsible for, the alleged discriminatory pay and

promotion decisions. Third, rather than rely on statistical analyses that were national in scope to demonstrate the challenged practices had an adverse impact on the plaintiff class, the plaintiffs in these successor class cases rely on statistical comparisons based on populations defined by the region and store at which the challenged decisions were made. *Id.* at 356-58. Fourth, rather than seek certification of their back pay claims under Rule 23(b)(2), the successor class plaintiffs rely on Rule 23(b)(3). *Id.* at 361-63. While challenging the same underlying discriminatory conduct as the former national class, therefore, the successor regional class cases, like the plaintiffs in the pending cases, seek to overcome, rather than to re-litigate, the flaws in the original class that was rejected.

Having been members of a failed national class, the successor class plaintiffs are entitled to *American Pipe* tolling but are not bound by the adverse class certification ruling. *Smith v. Bayer Corp.*, 564 U.S. 299, 312 (2011) ("A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions."). Thus, these successor class plaintiffs seek their first opportunity to prosecute their claims pursuant to classes designed to address the standards for certification clarified by the *Dukes* decision. While there is no dispute that these successor plaintiffs' claims would be timely if they were pursued individually, the choice to pursue the claims in regionally-defined classes has prompted a challenge to the continued availability of *American Pipe* tolling. Were *American Pipe* tolling denied to these women simply because they

elected to bring their claims collectively, rather than individually, they will have been deprived of a right simply because of the form of action they elected to pursue. As this Court ruled in *Shady Grove*, impediments to class certification may not be erected to the certification of claims that can satisfy the requirements of Rule 23. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) (Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," and "provides a one-size-fits-all formula for deciding the class-action question."). And those who bring class cases in the future will no longer rely on the pendency of the original putative class to forbear from lodging their own class claims, resulting in "a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983).

Having attempted to remedy the deficiencies in the *Dukes* national class action of which they were putative members rather than seeking to re-litigate the deficient features of that failed class, these successor class plaintiffs are entitled to the same rights to *American Pipe* tolling regardless of whether they pursue their claims individually or collectively.

## ARGUMENT

### I. THE SUCCESSOR WAL-MART CLASS CASES ILLUSTRATE THE PERMISSIBLE USE OF *AMERICAN PIPE* TOLLING

Seven years ago, this Court reversed certification of a national class of women who alleged sex discrimination in pay and promotions against Wal-Mart Stores. *Dukes*, 564 U.S. 338. Rather than hold as a matter of law that the plaintiffs' claims were not susceptible to class certification, the Court ruled that the record presented to the district court was insufficient to support certification of an expansive national class. In the wake of that decision, members of the former national class have sought to pursue claims on behalf of themselves and other members of that failed national class in more narrowly-framed successor class actions. The timeliness of their claims requires application of *American Pipe* tolling that was accorded them as members of the original national class. In these successor cases, former members of the *Dukes* class frame their class claims to address the deficiencies in the national class that were cited as grounds for reversal. As such, they demonstrate the judicial economy and equity that is achieved when class plaintiffs can benefit from *American Pipe* tolling after decertification of a differently-defined class of which they were putatively a part.

### A. After clarifying the legal standards for class certification, the *Dukes* Court found the plaintiffs had failed to provide evidence sufficient to warrant certification of a national class

On June 21, 2004, the district court presiding over the *Dukes* litigation certified a nationwide class of female Wal-Mart retail sales employees with pay and/or promotion claims. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). After six years through the appellate process, an *en banc* panel of the Ninth Circuit largely affirmed the class order. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). On June 20, 2011, this Court reversed the Ninth Circuit's decision, thereby denying certification of the alleged nationwide class.

The Court found that the plaintiffs had failed to present proof of a general policy of discrimination or a common mode of exercising discretion sufficient to satisfy the commonality requirement of Rule 23(a). *Dukes*, 564 U.S. at 356-58. Wal-Mart had structured its retail operations into 41 regions across the country, and the Court concluded that the plaintiffs had failed to account for differences in the practices they challenged by region.

Rather than reject the viability of the plaintiffs' claims altogether or conclude the claims could never be certified as a class, the Court identified with particularity the shortcomings in the evidence that resulted in its failure to satisfy the commonality requirement of

Rule 23. The Court concluded that the plaintiffs had failed to provide "significant proof that Wal-Mart operated under a general policy of discrimination" required to certify a pattern or practice disparate treatment claim. *Id.* at 355. The Court likewise found that the plaintiffs failed to provide "convincing proof of a companywide discriminatory pay and promotion policy" or that there was "a common mode of exercising discretion" in the challenged practices that could warrant certification of the plaintiffs' national disparate impact claims. *Id.* at 357, 359.

The Court also found the plaintiffs' statistical evidence lacking. The statistics presented in the national class action demonstrated disparities nationally, but was not appropriately tied to the regional and store levels at which the challenged decisions were made. *Id.* at 356-58. And the plaintiffs' anecdotal evidence alone was too weak to raise an inference that Wal-Mart's personnel decisions were discriminatory. *Id.* at 358.

Because the Court's ruling was based on a failure of proof, its decision did not foreclose presentation of evidence to support certification of narrower class claims focused on the level at which pay and promotion decisions were made. The Court explained that claims "conceivably could" satisfy Rule 23's commonality requirement if they offered "proof that an employer operate[s] under a general policy of discrimination," even though the plaintiffs' evidence failed to support such a general policy of discrimination that would support a nationwide class. *Id.* at 353. Similarly, the Court left open the possibility of certifying claims that some

managers "may be guilty of intentional discrimination that produces a sex-based disparity" at something less than a company-wide level. *Id.* at 355.

This Court did not address, and certainly did not foreclose, certification of claims challenging policies and practices operating at Wal-Mart's regional level if they could satisfy the requirements of Rule 23 based on a more complete record. In fact, the Court observed that the plaintiffs were "subject to a variety of regional policies that all differed," allowing for the possibility that regional classes could be certified. *Id.* at 359-60. Not only did the Court reject certification of a national class on evidentiary grounds, but it also allowed for the possibility that class cases narrower in scope might be appropriate for class adjudication.

### B. The *Dukes* plaintiffs followed this Court's guidance by bringing successor class actions that are regional in scope

Informed by this Court's ruling, plaintiffs brought successor class actions in five separate Wal-Mart cases, challenging gender disparities in the pay and promotion decisions made within the regions encompassed by each case and the policies and practices that contributed to those disparities.

Striking the balance prescribed by the *American Pipe* doctrine, these successor regional class cases are sufficiently similar to the claims advanced in the nationwide class case to avoid surprise to Wal-Mart, while seeking certification of classes materially

different from the national class that the Court rejected. By alleging the same pattern of gender discrimination in pay and promotion practices at Wal-Mart's stores that was at issue in the national class, the plaintiffs ensured that the successor cases involved the same subject matter as the national class, thereby avoiding the potential for abuse of which Justice Powell expressed concern in his concurrence in *Crown, Cork*, 462 U.S. at 355 (Powell, J., concurring).

At the same time, by altering the proposed regional successor classes to address the flaws in the national class cited by the *Dukes* Court, the plaintiffs have not sought to re-litigate the same class that the Court had previously rejected. Changes in the geographic scope, in the way the challenged practices have been framed, and in the granularity of the evidence offered to support the discrimination claims are all reflected in the successor regional class claims, and are therefore materially different from the national class that the *Dukes* Court rejected.

Informed by this Court's observation that the plaintiffs were "subject to a variety of regional policies that all differed," *id.* at 359, the successor class actions are framed regionally. In addition, each regional case challenges the decisions of a discrete group of managers who made, and were responsible for, the alleged discriminatory pay and promotion decisions. *Id.* at 350 (offering as an example of conduct that could satisfy the commonality requirement "the assertion of discriminatory bias on the part of the same supervisor"). In particular, the regional class complaints attribute

specific evidence of gender bias and gender stereotyping to managers who had a role in, or who generally influenced, the challenged pay and promotion decisions within each region. By focusing on a discrete team of supervisors, plaintiffs' allegations provide the "glue holding the alleged reasons for all [the employment] decisions together." *Id.* at 352.

The regional class claims also present substantially more granular and refined statistical analyses. The *Dukes* Court had faulted the statistical analysis the plaintiffs presented in support of their nationwide class, as the disparities observed "may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which plaintiffs' theory of commonality depends." *Id.* at 357. To address this, the regional plaintiffs have alleged disparities in pay and promotion decisions adverse to women drawn from statistical analyses conducted at the store (for hourly claims) and regional levels (for management claims) at which the challenged decisions were made.

The plaintiffs' successor regional class cases differ substantially from the *Dukes* case in several other respects. For example, the *Dukes* Court concluded that the claims seeking back pay were more properly subject to certification under Rule 23(b)(3) than under Rule 23(b)(2). *Id.* at 361-63. In response, the regional plaintiffs seek certification of claims to injunctive relief under Rule 23(b)(2) and claims to monetary relief under Rule 23(b)(3).

In sum, the allegations made, and the evidence gathered to support them, are unique to the regions where the successor class actions have been brought. The plaintiffs' newly-alleged facts distinguish the class claims in the regional actions from the class claims in the nationwide *Dukes* litigation. Without changing the underlying causes of action, the former *Dukes* plaintiffs brought successor class claims designed to remedy the flaws cited in the national class. *See Dukes v. Wal-Mart Stores, Inc.*, 3:01-cv-02252, Dkt. 812 (N.D. Cal. Sept. 21, 2012) at 8 (denying Wal-Mart's motion to dismiss post-*Dukes* regional class case where plaintiffs allege new evidence potentially sufficient to certify a class); *Phipps v. Wal-Mart Stores, Inc.*, 3:12-cv-01009, Dkt. 111 (M.D. Tenn. Nov. 18, 2016) at 11-12 (same).

These differences between the regional classes and the former national class ensure that the successor cases will not seek to re-litigate the flawed features of the national class. Instead, the successor class plaintiffs seek the opportunity to certify class claims that no court has ever addressed. *See Yang v. Odom*, 392 F.3d 97, 106 (3d Cir. 2004) ("[I]t would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown."). Affording the plaintiffs a first chance to certify a class that has never previously been considered by a court is neither unfair to Wal-Mart nor an imposition on the courts.

### C. The ability of plaintiffs in three regional Wal-Mart class actions to continue their claims collectively hinges on the Court's decision in the case now presented

The question whether plaintiffs in these regional successor class actions may retain their right to *American Pipe* tolling has occupied the parties for several years in three of the five regional class cases.

*Texas*. The Fifth Circuit ruled that the district court should have ruled on a motion to intervene for purposes of appealing the Northern District of Texas decision to strike class allegations on the grounds that *American Pipe* tolling was not available. *Odle v. Flores*, 683 F. App'x 288, 289 (5th Cir. 2017). Once the district court rules on intervention, the tolling issue will be ripe for review by the Fifth Circuit, but that case has been stayed pending a ruling in the case now presented before this Court. *Odle v. Flores*, 3:11-cv-02954, Dkt. 113 (N.D. Tex. Jan. 3, 2018).

*Florida*. The Eleventh Circuit, addressing an appeal from the Southern District of Florida after dismissal on the same unrelated procedural issue addressed in the Northern District of Texas, held that the appeal was untimely and therefore the Eleventh Circuit did not have jurisdiction to hear the appeal. *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1326 (11th Cir. 2017). However, a new Florida regional case, *Forbes v. Wal-Mart Stores, Inc.*, No. 9:17-cv-81225, Dkt. 1 (S.D. Fla. Nov. 6, 2017), has been filed and will present the *American Pipe* tolling issue.

*Tennessee*. In a regional case brought in the Middle District of Tennessee, the district court initially granted Wal-Mart's motion to dismiss on grounds that prior circuit precedent divested plaintiffs of *American Pipe* tolling when they pursued their claims collectively rather than individually. *Phipps v. Wal-Mart Stores, Inc.*, 925 F. Supp. 2d 875, 905 (M.D. Tenn. 2013). The Sixth Circuit reversed, ruling that prior circuit precedent permitted plaintiffs who brought successor class claims to retain their right to *American Pipe* tolling. *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 653 (6th Cir. 2015). As the Sixth Circuit found, where "no court had definitively addressed the requested class certification," *American Pipe* tolling remained available to plaintiffs who pursued their claims collectively. *Id.* at 647. Thus, nothing "bar[red] the plaintiffs' present effort to *certify for the first time* this timely-filed . . . class comprised of current and former female employees of Wal-Mart in Region 43." *Id.* at 649. The parties in that case are presently engaged in class-related discovery.

*Wisconsin and California*. In two other cases, one in the Western District of Wisconsin and the other in the Northern District of California, the district courts rejected the regional class claims on the merits, not on the basis of the unavailability of tolling. *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263, 273 (W.D. Wis. 2013); *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1127 (N.D. Cal. 2013). And while the courts granted dismissal of those claims, those cases are factually distinguishable from the other regional class actions,

concerning different regions, with different records, and challenging different policies and groups of decision-makers.

### D. The post-*Dukes* regional class cases achieve the economies that *American Pipe* intended to promote

As pointed out in *American Pipe* and *Crown, Cork*, Rule 23 encourages members of putative classes to refrain from pursuing their own claims while certification of the class of which they would be members is decided. *American Pipe*, 414 U.S. at 550 ("A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions."); *Crown, Cork*, 462 U.S. at 352-53 ("Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."). Once the national *Dukes* class was vacated, some of its former members brought differently- and more narrowly-framed class claims challenging the same conduct. Were they to lose their tolling, and with it the ability to bring differently-defined class claims, these former members of the *Dukes* class would lose their incentive to await a ruling on the original class certification before determining whether to proceed with their own class cases. Having awaited a final ruling on certification of the *Dukes* class, as *American Pipe* dictates, the successor regional class plaintiffs

should be entitled to proceed with their own class claims. *American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 350-51.

Absent the assurance that *American Pipe* tolling would have remained available to members of the original *Dukes* class, whether the members pursued their successor claims collectively or individually, they would have been compelled to file separate class and individual claims before the viability of the *Dukes* putative class was determined. The multiplicity of cases, styled individually and collectively, that would have been pending while certification of the *Dukes* national class was adjudicated would have imposed unnecessary burdens on the judiciary and the parties, and may have led to inconsistent rulings on class certification. This would have caused a "needless multiplicity of actions—precisely the situation that . . . Rule 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork*, 462 U.S. at 351. Instead, as *American Pipe* and *Crown, Cork* intended, plaintiffs waited until there had been a final ruling on class certification before proceeding with their own claims and framed their class claims to accord with the lessons from the *Dukes* decision. In doing so, the former *Dukes* class members avoided the multiplicity of duplicative claims that would have undermined the effectiveness of Rule 23 while ensuring that Wal-Mart had prior notice of the gravamen of their claims. *American Pipe*, 414 U.S. at 554-55.

Nor can the successor regional class plaintiffs be faulted for awaiting a ruling on the *Dukes* class

certification before proceeding with their own class cases. As this Court observed, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork*, 462 U.S. at 352-53.

Moreover, denying the regional plaintiffs the benefit of *American Pipe* tolling would have an immediately harmful effect. Pursuit of these cases collectively may be the only way for plaintiffs to assert claims challenging the pattern or practice of discrimination Congress intended Title VII to prohibit. And preventing regional plaintiffs from moving forward as a class could impair their ability to secure the kind of injunctive relief necessary to address the underlying discriminatory conduct. Absent a certified class, private plaintiffs typically lack the ability to secure the broad injunctive relief that can eliminate widespread discrimination, as Congress intended Title VII to permit. *See Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) ("[C]lasswide relief, such as the injunction here . . . is appropriate only where there is a properly certified class."); *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs."); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper.").

Thus, the pending successor regional class cases, like the *Resh* plaintiffs, illustrate the proper and effective application of *American Pipe* tolling to promote a consistent and efficient adjudication of class certification while providing adequate notice of the underlying claims to the defendant and permitting members of the original class to protect their right to pursue their claims collectively.

## CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner,*

v.

MICHAEL H. RESH, *ET AL.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of such laws frequently involves class actions as well as individual lawsuits. Public Citizen has a longstanding interest in preserving the viability of these mechanisms for protecting the rights of consumers and the general public.

Accordingly, Public Citizen has participated as amicus curiae, and its attorneys have served as counsel to parties or amici curiae, in many cases in this Court and other federal courts involving class action procedures, including: *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Of particular relevance here, Public Citizen's counsel represented the petitioner in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparing or submitting it. The parties participating in this Court have filed blanket consents to filing of amicus briefs.

(2010), in which the Court held that plaintiffs who satisfy the terms of Federal Rule of Civil Procedure 23 are entitled to pursue their claims through a class action. Public Citizen submits this brief to explain how *Shady Grove* and the principles that underlie it compel the conclusion that plaintiffs who possess live claims by virtue of the tolling effect of a prior class action may pursue those claims as a class if they are able to demonstrate that the class satisfies Rule 23's requirements for class certification.

## INTRODUCTION AND SUMMARY OF ARGUMENT

When this action was filed, all members of the proposed class undisputedly possessed live securities fraud claims against petitioner China Agritech because the running of the statute of limitations on those claims had been suspended during the pendency of a previous class action under the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Under this Court's holding in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), the class members were not bound by any prior ruling that their claims could not be brought as a class action. And no considerations of comity suggested that certification of the class was unwarranted, because no court had ever considered whether the showing they proposed to make was sufficient under Rule 23 to justify class certification.

Nonetheless, China Agritech argues that members of the class, plaintiffs here, could pursue their claims only individually, whether by filing separate actions, joining their individual claims under Rule 20, or intervening under Rule 24 in an action brought by other individual class members. Of the procedural mechanisms potentially available under the Federal Rules of Civil

Procedure for asserting such claims, China Agritech asserts, only the class action procedures of Rule 23 are unavailable to these plaintiffs, regardless of whether they would otherwise satisfy the Rule's requirements.

China Agritech's submission is fundamentally at odds with the terms of Rule 23, the nature of the aggregate litigation the Rule permits, and basic principles governing the effect of procedural rules promulgated under the Rules Enabling Act. As this Court held in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the terms of Rule 23 entitle plaintiffs to bring their claims as a class action in federal court if they satisfy the Rule's criteria for certification of a class. Moreover, the remedy any one plaintiff is entitled to receive on an otherwise viable claim cannot depend on whether the claim is pursued in an individual action or a class action: A class action is a procedural device for aggregating claims that plaintiffs possess individually and can neither expand nor limit their entitlement to relief. Indeed, holding that whether a plaintiff has a claim for relief depends on whether relief is sought under Rule 23, in an individual action, or in another form of aggregate litigation permitted under the Federal Rules of Civil Procedure would be incompatible with the Rules Enabling Act's command that rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Moreover, the proposition that plaintiffs may not rely on *American Pipe* tolling in a subsequent class action threatens to reintroduce through the back door the proposition the Court rejected in *Smith v. Bayer*—namely, that plaintiffs are precluded from pursuing claims as a class by previous decisions rejecting class

certification in cases in which they were not named plaintiffs. *Smith* held that foreclosing plaintiffs from seeking class certification because another plaintiff's effort to represent a class had failed would be contrary to fundamental principles governing the preclusive effects of judgments. Here, China Agritech seeks essentially the same result through another means—one that is equally incompatible with fundamental jurisprudential principles.

## ARGUMENT

### I. All members of the plaintiff class had live claims when this action was filed.

Under this Court's holdings in *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), which China Agritech does not question, each member of the proposed class in this case had a live claim when this action was filed. Accordingly, under the terms of both Rule 23 and the fundamental principle that a class action under the federal rules does not—and cannot—change the substantive entitlements of class members, the class members may pursue their claims in a class action if the requirements of Rule 23 are met.

*American Pipe* establishes two propositions central to this case: that "the filing of a timely class action commences the action for all members of the class as subsequently determined," 414 U.S. at 550, and that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *id.* at 554. Although *American Pipe* considered only whether the tolling effect of a proposed but ultimately uncertified class action rendered subsequent motions by class members to intervene in that action timely, *see*

*id.* at 553, the Court soon recognized that its reasoning could not be confined to such cases. In *Eisen v. Carlisle & Jacquelin*, decided the same Term as *American Pipe*, the Court recognized that plaintiffs who might opt out of a certified class after the time the statute of limitations otherwise would expire had timely claims because *American Pipe* "established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." 417 U.S. 156, 176 n.13 (1974).

*Crown, Cork* confirmed that the holding of *American Pipe* "is not to be read so narrowly" as to apply only to the particular procedural circumstances it addressed. 462 U.S. at 350. Rather, *Crown, Cork* held, "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class.'" *Id.* (quoting *American Pipe*, 414 U.S. at 554); *see also id.* at 353–54. Moreover, "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Id.* at 354.

In *Chardon v. Fumero Soto*, the Court again confirmed that a federal class action "toll[s] the statute of limitations until class certification is denied." 462 U.S. 650, 661 (1983). That is, "the statute of limitations ceases to run," *id.* at 652 n.1, during the period in which the action is pending as a class action or potential class action.[2]

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[2] *Crown, Cork* and *Chardon* both concerned plaintiffs who filed individual actions after the failure of certification of the class actions they relied on for tolling. The occasional references of the Court in both cases to "individual actions" refer to the procedural posture of the cases; they do not purport to impose a limit on the

(*Footnote continued*)

The necessary consequence of these holdings is that, once tolling ceases, each class member who possessed a live claim at the time the class action was filed continues to have a live claim until whatever time remains under the statute expires. The claims of each class member may be asserted until that time runs out. *See id.* at 661.[3]

## II. Rule 23 entitles plaintiffs with viable claims to bring them in a class action if they meet the Rule's standards for class certification.

The filing of a class-action complaint within the time remaining under the applicable limitations period, no less than the filing of an individual action or

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type of action a beneficiary of *American Pipe* tolling may later bring. Notably, in stating the rule they applied, both *Crown, Cork* and *Chardon* said that a plaintiff whose claim is timely because of the tolling effect of a class action that is ultimately not certified may either intervene in that action or bring a "separate" action, *Crown, Cork*, 462 U.S. at 352; *Chardon*, 462 at 661 n.14—*i.e.*, an action separate from the original class action. Neither decision suggests that the separate action could not be a *class* action.

[3] In this case and most other instances involving federal claims with federally defined limitations periods, the time remaining will consist of the statutory limitations period less whatever time ran on it before it was suspended by the filing of a class action. *See Crown, Cork*, 462 U.S. at 354; *American Pipe*, 414 U.S. at 561; *cf. Artis v. Dist. of Columbia*, 138 S. Ct. 594, 601 (2018) (describing the ordinary effect of tolling or suspending a limitations period as "that the limitations period is suspended (stops running) while the claim is *sub judice* elsewhere, then starts running again when the tolling period ends, picking up where it left off"). In some cases, however, when a federal statute borrows state limitations law, the amount of time remaining may be determined differently. *See Chardon*, 462 at 661–62. In either event, each class member's claim remains timely for the full remaining time established by the applicable law.

an attempt to intervene in an existing suit, satisfies the statute of limitations for class members who have live claims by virtue of the tolling effect of a previous action. This consequence follows from *American Pipe*'s holding that "the filing of a timely class action commences the action for all members of the class as subsequently determined." 414 U.S. at 550. That the reason class members have live claims is the tolling effect of a prior action does not alter the conclusion that the statute of limitations is satisfied by commencement of an action properly asserting those claims within the time remaining in a limitations period. Indeed, in *American Pipe* itself, the class action whose filing tolled the limitations period for the claims of class members was itself timely only because of the tolling effect of an action previously filed by the United States asserting the same claims. *See American Pipe*, 414 U.S. at 541–42 (citing 15 U.S.C. § 15b).

China Agritech argues that a class action, alone among the procedural mechanisms for asserting a claim in federal court, is an impermissible vehicle for bringing claims that are live because of the tolling effect of a prior class action. That argument is irreconcilable with this Court's construction of Rule 23 in *Shady Grove* and with the basic principles on which that decision rests.

*Shady Grove* addressed whether, in an action filed in federal court, Rule 23 allowed a plaintiff to assert certain state-law claims in a class action when, under state law, the same claims (for statutory penalties) could not be the subject of a class action in a state court. Before addressing the consequences of possible conflict between state and federal law under *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Erie Railroad Co. v.*

*Tompkins*, 304 U.S. 64 (1938), the Court first had to determine whether a conflict existed. That question depended on whether Rule 23's terms entitled the plaintiff to proceed with a class action in federal court if the case satisfied the Rule's criteria for certification of a class.

On the latter question, *Shady Grove* held, Rule 23 spoke unequivocally:

> [Rule 23] states that '[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). Fed. Rule Civ. Proc. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.

559 U.S. at 398.

"[W]hat Rule 23 does," in other words, is "empower[] a federal court 'to certify a class in each and every case' where the Rule's criteria are met." *Id.* at 399. Because the Rule provides that "if the prescribed conditions are satisfied, '[a] class action *may be maintained*,'" *id.* at 399–400 (quoting Rule 23; emphasis by the Court), it follows that if a plaintiff has a claim, and it meets the Rule's requirements, "[h]e may bring his claim in a class action if he wishes." *Id.* at 400. And because "Rule 23 *automatically* applies 'in all civil actions and proceedings in the United States district courts,'" *id.* (emphasis original, citation omitted), it follows that "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a

class action if the Rule's prerequisites are met." *Id.* at 406 (emphasis original).[4]

The dissent in *Shady Grove*, while disagreeing with the majority on how to reconcile the commands of state and federal law at issue in the case, agreed on the point most relevant here: that "Rule 23 describes a method of enforcing a claim for relief," and "authorizes class treatment for suits satisfying its prerequisites." *Id.* at 447 (Ginsburg, J., dissenting). The dissent saw no conflict between this authorization and the New York law at issue because it viewed the latter as a *substantive* limit on the claims of members of the class rather than as a prohibition on the use of Rule 23 to pursue claims available as a matter of substantive law through the class mechanism. *Id.* at 447–48. In a case, like this one, where the claims rest on federal law, the dissenting view of Rule 23 leads to the same result as the majority's: Unless Congress has provided otherwise, *see id.* at 400 (majority); *id.* at 450 (dissent), plaintiffs who have actionable claims may pursue them in a class action if they satisfy the requirements of the Rule, *see id.* at 398 (majority); *id.* at 447 (dissent).

Thus, for purposes of this case, the critical teaching of *Shady Grove*, reflected in both the majority and dissenting opinions, is that if a class of plaintiffs possess a common claim and if they otherwise meet the requirements of Rules 23(a) and (b)—a point not at issue at

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[4] The cited passages from *Shady Grove* reflect the holding of a five-Justice majority. In explaining why federal law as reflected in Rule 23 prevailed over the state rule (an issue not pertinent here), the lead opinion commanded only four votes, with Justice Stevens concurring on that point in an opinion offering a somewhat different analysis. *See id.* at 416 (Stevens, J., concurring in part and concurring in the judgment).

this stage in this action—they are *entitled* to assert their claims in a class action. *Id.* at 398 (majority). Here, the limitations period for the claims of each member of the class was tolled during the pendency of a previous class action. Once that tolling ceased, each member had a live claim for the duration of the time remaining under the statute of limitations, which had not expired when this action was commenced. Because a timely claim could be stated on behalf of each member of the class, it would violate Rule 23 as construed in *Shady Grove* to prohibit the assertion of those claims on behalf of a class.

China Agritech insists that *Shady Grove* is inapplicable because it "did not mention tolling," Pet. Br. 15, and "had nothing to do with equitable tolling," Pet. Br. 51. Of course, *Shady Grove* itself was not a case about tolling, but it was about Rule 23. And *Shady Grove*'s holding that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," 559 U.S. at 398, dictates the outcome here. China Agritech's position that plaintiffs with live claims may pursue them through any otherwise applicable procedure *except for* a Rule 23 class action contradicts that categorical rule.

China Agritech nonetheless asserts that "*Shady Grove* simply does not require or even authorize courts to toll statutory time bars in [these] circumstances." Pet. Br. 52. But the question is not whether *Shady Grove* authorizes *tolling*. Under this Court's holdings in *American Pipe* and *Crown, Cork*, the running of the statute of limitations was already tolled for all class members during the pendency of the earlier class action. As *Crown, Cork* held, it is "[t]he filing of a class action" that "tolls the statute of limitations 'as to all

asserted members of the class.'" 462 U.S. at 350 (quoting *American Pipe*, 414 U.S. at 554). Moreover, tolling lasted "for all members of the putative class until class certification [was] denied." *Id.* at 354. Tolling then ceased, and the statute of limitations began to run. And the parties agree on that point.

Thus, the question now is not whether to give some *additional* tolling effect to a prior class action: tolling began and ended with the earlier class actions. The question now is only whether the claims the class members concededly retained by virtue of the now-completed period of tolling were properly asserted by filing a class action within the time remaining. *Shady Grove*'s holding that cognizable claims may be brought and maintained in a class action if the terms of Rule 23 are satisfied supplies the answer to that question: Because it was proper to assert the claims of the class members under Rule 23, the filing of a class action within the limitations period commenced a timely action for all of them. *See American Pipe*, 414 U.S. at 550.

## III. This Court's holding in *Shady Grove* rests on basic principles of aggregate litigation and the Rules Enabling Act.

China Agritech's position that a plaintiff with a live claim can pursue it in an individual action, or through intervention or joinder, but not through a class action is not only at odds with *Shady Grove* and the terms of Rule 23, but also with fundamental principles of aggregate litigation and the Rules Enabling Act. China Agritech's position boils down to the assertion that an individual's entitlement to relief is different inside and outside of a class action. That is, under China Agritech's view, a plaintiff in an individual action would have a timely claim, but the same plaintiff may

not assert the same timely claim as part of a class action.

That proposition contravenes "the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting). A Rule 23 class action is a vehicle that, where the Rule's criteria are satisfied, allows aggregate pursuit of the claims of a class encompassing anyone who could "bring a freestanding suit asserting his individual claim." *Shady Grove*, 559 U.S. at 408 (plurality). Class actions "leave[] the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* They "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed." *Id.*[5] Thus, a plaintiff's right to recovery cannot depend on whether the plaintiff asserts it in a class action or an individual action. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–48 (2016).

The principle, recognized by this Court, that the substantive rights of individual plaintiffs are the same whether asserted in a class action or an individual action flows directly from the Rules Enabling Act's prohibition on the promulgation of procedural rules that alter substantive rights. "In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,'

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[5] Although the quoted language above is from the plurality portion of *Shady Grove*, the point was subsequently endorsed in Justice Ginsburg's dissenting opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 696 (2010).

§ 2072(b)." *Shady Grove*, 559 U.S. at 406–07 (plurality). As the Court observed in *Wal-Mart Stores, Inc. v. Dukes*, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" 564 U.S. 338, 367 (2011).

Inclusion in a class action thus neither confers substantive rights on a plaintiff nor takes them away. If a plaintiff could pursue a claim individually but not in a properly certified class, Rule 23 would "*abridge* ... [a] substantive right" in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b) (emphasis added). Accordingly, in *Tyson Foods*, the Court held that a judicial ruling that would limit a plaintiff's substantive right to prove her case "merely because the claim is brought on behalf of a class" would "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge ... any substantive right.'" 136 S. Ct. at 1046.[6] *See also Shady Grove*, 559 U.S. at 408 (plurality opinion); *id.* at 422 (Stevens, J., concurring); *id.* at 438 (Ginsburg, J., dissenting).

Simply put, it would "violate[] the Rules Enabling Act [to] giv[e] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S. Ct. at 1048. China Agritech's position would do just that.

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[6] The dissent in *Tyson Foods* agreed with the majority that the substantive claims of individual class members should not differ depending on whether they are asserted in a class or individual action. *See id.* at 1057 (Thomas, J., dissenting) (citing 136 S. Ct. at 1046–47 (majority)).

## IV. The argument against tolling attempts to resurrect the preclusion arguments rejected by this Court in *Smith v. Bayer*.

Much of China Agritech's argument rests on the notion that the Court should abandon the principle that plaintiffs with viable claims may pursue them in either an individual or class action because application of that principle here would lead to "relitigation" of previous decisions denying class certification. *E.g.*, Pet. Br. 22–23. Relitigation, however, is a concern addressed by preclusion doctrines that determine when parties are bound by former adjudications. And this Court has already held, without dissent, that the denial of certification in a prior case does not preclude individuals other than the named plaintiff from seeking class certification in a subsequent case. *Smith v. Bayer*, 564 U.S. at 312–18.

*Smith v. Bayer* holds unequivocally that, under "longstanding principles of preclusion," *id.* at 318, when certification is *denied* in a case, absent class members are not bound by the adjudication of the certification issue. Rather, class members other than the named plaintiff can be bound by adjudication of an issue in a class action only if the action is certified, because the very point of certification is to determine whether it is fair to bind absent parties to an adjudication. *Id.* at 314–15. When a court holds that an action may not be maintained as a class action, the essential "precondition" for binding an absent class member to *any* adjudication in the action—including the adjudication of the certification issue itself—is absent. *Id.* at 315. Thus, "[n]either a proposed class action nor a rejected class action may bind nonparties." *Id.*

China Agritech's argument attempts an end-run around *Smith v. Bayer* by applying another label (tolling) to what it acknowledges is actually preclusion of "relitigation" of certification decisions. As explained above, however, this approach violates fundamental class-action principles—in particular, the principle that plaintiffs have the same substantive rights whether their claims are pursued on an individual or class basis—just as much as the preclusion-based approach rejected in *Smith v. Bayer*. Similarly, the policy argument China Agritech invokes to cover the legal deficiencies of its position is the same one rejected in *Smith v. Bayer*: namely, that the consequence of applying normal class action doctrines would allow "class counsel [to] repeatedly try to certify the same class 'by the simple expedient of changing the named plaintiff in the caption of the complaint.'" *Id.* at 316. That policy argument is no more a reason to distort the *Shady Grove* principle that a plaintiff with a valid individual claim can assert it on behalf of a class that satisfies Rule 23 than it was for turning standard preclusion principles upside down in *Smith v. Bayer*.

That the argument against reliance on *American Pipe* tolling in a successive class action is in essence a recycling of the preclusion approach rejected in *Smith v. Bayer* is demonstrated by the fact that nearly all of the lower-court decisions rejecting tolling in successive class actions before *Smith* rested either explicitly or implicitly on preclusion principles. As Judge Easterbrook explained in *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), those decisions were based on what was then thought to be "the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." *Id.* at 563. They reflected the view "that a decision declining to certify

a class in the first suit binds all class members, who cannot try to evade that decision by asking for a second opinion from a different judge." *Id.* at 563–64. In other words, their premise was that "[c]lass members must abide by the first court's understanding and application of Rule 23." *Id.* at 564. And because the decisions were fundamentally about preclusion, they permitted successive class actions where the reasons for the prior denial of certification were not "applicable" to the later suit, *id.*—an approach similar to China Agritech's fallback argument, *see* Pet. Br. 54–59.[7]

As China Agritech itself acknowledges, *Smith v. Bayer* pulled the rug out from under such explicitly or implicitly preclusion-based approaches. *See* Pet. Br. 47–48. What China Agritech fails to realize, however, is that manipulating the *American Pipe* rule to resurrect a bar on successive class actions when "the propriety of class treatment has been previously adjudicated," Pet. Br. 54, equally fails to square with *Smith*'s holding that principles of "former adjudication" do not permit that result. 564 U.S. at 302.

In sum, the holding of *Smith v. Bayer* combines with that of *Shady Grove*, and the principles underlying it, to compel rejection of China Agritech's view that a class action brought by plaintiffs whose claims were tolled by a prior, ultimately uncertified class action is impermissible. If an individual named plaintiff has timely claims, *Shady Grove* permits her to pursue them in a class action together with other plaintiffs with like claims, if Rule 23's criteria are satisfied. And *Smith v.*

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[7] Because no court has ever ruled on whether the proposed showing of the plaintiffs in this action would support certification, China Agritech's fallback argument would be unavailing here, *see* Resp. Br. 50–51, even if it were legally sustainable.

*Bayer* forecloses the possibility that the named plaintiff's attempt to satisfy Rule 23's certification criteria can be precluded by the outcome of a prior case in which another plaintiff did not succeed in obtaining certification of a class.

In this case, the proposed class consists of members who had live claims when the action was brought. None of those class members was bound by any decision holding that the proposed class action could not proceed. Indeed, no court has ever reached a decision on their entitlement to class certification that would be persuasive under principles of comity. Under these circumstances, Rule 23 entitles the plaintiffs to proceed as a class if they can meet their burden of proving that the action satisfies the Rule's criteria for class certification.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 2018

No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner,*

v.

MICHAEL RESH, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici curiae* are former federal district court judges who have experience adjudicating class action cases. The attached Appendix contains a list of the *amici* along with biographical information for each. *Amici* are interested in this case because of their years of service to the federal judiciary and their ongoing commitment to ensure that federal judges have the means to manage their caseloads and dispense equal justice under law to all litigants.

*Amici* urge the Court to uphold the decision below and to hold that, upon the failure of an earlier class action that tolled the claims of absent class members pursuant to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), an absent class member acting within the tolled period may subsequently file a class action complaint and is not limited to pursuing an individual claim.[2]

## SUMMARY OF ARGUMENT

This Court has repeatedly instructed that Rule 23 of the Federal Rules of Civil Procedure "*automatically* applies 'in all civil actions and proceedings in the United States district courts.'" *Shady Grove*

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] *Amici* take no position on the merits of this or other class actions.

*Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 400 (2010) (quoting Fed. R. Civ. P. 1) (emphasis in original). While complex and time-consuming, class actions are an efficient mechanism to adjudicate common claims that affect numerous individuals or entities. That remains the case even in circumstances where a class action is timely only because a prior (failed) class action tolled the claims of the putative class members under the rule of *American Pipe*.

*Amici* acknowledge Petitioner's concerns about "stacked" class actions. In many instances, permitting a follow-on class action outside the original limitations period may not be just or prudent. District judges have ample means to identify such cases and to decline requests to adjudicate them on a collective basis. And decisions after *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), in which this Court instructed federal courts to employ "principles of *stare decisis* and comity" to mitigate the effects of repetitive litigation, show that district courts have used the tools available to them. But a rule that bans class actions, in all situations, from the reach of *American Pipe* tolling would not promote justice. Such a rule would impair the integrity and symmetry of the Federal Rules of Civil Procedure and needlessly deny litigants access to a form of aggregate litigation that is also an important case-management device for district judges.

A holding by this Court that the *American Pipe* rule does not apply to a subsequent class claim by a member of a prior, putative class action could cause unnamed class members in pending and future class actions, before the expiration of the statute of limitations or statute of repose, to file (i) protective

class actions, simply to preserve their claims, or (ii) individual actions with greater frequency after the failure of a putative class action, since absent class members will not have their claims preserved by the filing of a class claim. The early protective class filings may complicate the already difficult process of choosing a lead plaintiff, including in securities cases, by forcing a district court to address more plaintiffs who seek to represent the putative class. Further, a substantial increase in multidistrict litigations could ensue if unnamed class members choose to file independent class suits in districts most convenient for them, but which might differ from the district in which the class case is proceeding. A single, consolidated class action could thus become subject to an MDL procedure that would expend more of the judiciary's time and resources than necessary.

Finally, a flat ban on class actions while individual actions are still cognizable could lead to unjust results. If the individual claims are meritorious but too costly or complex to adjudicate on an individual basis, it is hard to see why they should be rendered worthless merely because a prior class action failed on technical grounds. Alternatively, in some cases the individual claims will be both meritorious and economical, in which case courts might expect an onslaught of individual claims. Again, it is difficult to see why litigants should be prohibited from seeking, or courts from adjudicating, those claims on a class basis within the strictures of Rule 23. Indeed, the defendant might want to proceed on a class basis, and Rule 23 accommodates that possibility. It is not clear how Petitioner's proposed rule would operate in unusual but not inconceivable circumstances such as counterclaim class actions and

defendant class actions, and whether it would preclude or discourage some class litigation that would be beneficial to all parties. In the view of *amici*, prudence warrants leaving district judges with discretion—to be exercised with due regard for this Court's instruction in *Smith v. Bayer*—to grant or deny class certification for either party, in view of all the circumstances, including those that prompted the failure of the prior class action or actions.

## ARGUMENT

### I. THE RULE PROPOSED BY PETITIONER COULD BURDEN DISTRICT COURTS WITH DUPLICATIVE CLASS ACTIONS DURING THE TOLLING PERIOD

Class actions present a range of particular challenges for federal district courts to manage.

Even before they can consider the merits of class certification, district courts encounter early case management issues that are often complex and hotly contested. For example, courts must decide how to efficiently manage and resolve the spate of class filings that follow an event that might have harmed hundreds or thousands (or even tens of thousands) of individuals or entities in similar fashion. In certain types of class actions, such as securities class actions subject to the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA"), district courts must oversee the fierce competition among plaintiffs or groups of plaintiffs vying to be the lead. District courts must also consider whether to consolidate multiple actions for pretrial proceedings under the aegis of the Panel on Multidistrict Litigation.

After addressing the early-case management issues, and determining a plan for class discovery, district courts must decide whether to certify a class by applying Rule 23(a) and 23(b) to determine whether class treatment is appropriate. Under Rule 23(a), this includes determining whether the named plaintiff has claims that are typical of those of the proposed class, whether the named plaintiff and proposed class counsel can adequately represent the class, and whether there are questions of law or fact that are common to the class and susceptible to proof by common evidence. Fed. R. Civ. P. 23(a). District courts must also ensure that the class fits one of the types of classes under Rule 23(b). And district courts must do this all while ensuring that the rights of absent class members are adequately protected.

While class actions present administrative challenges, they remain an important way for district courts to resolve claims that, if litigated plaintiff by plaintiff, would clog the district courts with myriad overlapping if not identical actions.

In *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court concluded that the running of a statute of limitations should be suspended for the claims of absent class members during the pendency of a class action complaint. Each of those decisions was grounded in part on the concern that a contrary rule would induce potential class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553; *see also Crown, Cork & Seal*, 462 U.S. at 353-54. In essence, the *American Pipe* rule vindicates the case management principles embedded in Rule 23. *Cal.*

*Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (citing *American Pipe*, 414 U.S. at 556). As the Court observed in *American Pipe*, a "federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

In the experience of *amici*, *American Pipe* tolling has played a salutary role for district courts' management of class action while protecting the rights of absent class members. The *American Pipe* rule promotes efficient administration of justice by making it unnecessary for absent members of the putative class to file protective actions or intervention motions once a class action encompassing their claims has been filed.

The rule urged by Petitioner would diminish these benefits. Class members would have to worry that a pending class action will fail, such as on procedural or technical grounds, and the statute of limitations will thereafter bar further class-based claims. Cautious class members therefore may file protective class actions, perhaps in the same district and perhaps in other districts. As a result of the PSLRA's publication requirement, potential members of securities class actions may receive early notice of the litigation and ready access to counsel. When a securities class action is filed, plaintiffs' lawyers have an obligation, as well as an incentive, to notify potential class members of the action. Many of these potential class members contact one or more of the plaintiffs' firms who are competing to represent the lead plaintiff. If this Court finds Rule 23 inapplicable to claims timely brought after the expiration of

*American Pipe* tolling, it seems likely that plaintiffs' counsel will advise potential class members that they *cannot* merely sit by and assume that their rights are protected.

In the context of securities class actions, many securities are held through funds operated by professional managers. Investment managers are fiduciaries who have a duty to keep investors informed of rights and opportunities associated with their investments. *See* RESTATEMENT (SECOND) OF TRUSTS § 177 (1959) ("The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."). As a result, they are likely to monitor Business Wire and other sites that publish notices of class action filings. After learning of a class action involving securities held by their investors, investment professionals may feel obligated to tell their clients—particularly those whose claims may be too small to justify individual actions—that they should form a judgment about whether the filing of a protective class action complaint is advisable. At minimum, this imposes additional costs on investors, and it could impose additional burdens on the courts if investment professionals push investors to protect their rights by filing class complaints.

*Amici* cannot quantify the anticipated rise in separate class filings if the Court holds that *American Pipe* tolling extends the statute of limitations only for individual claims but not class claims. But protective class actions will cause needless administrative and possibly substantive burdens on district judges as they ascertain how to manage them during the pendency of another class

action addressing the same topic. Of course, district courts have the ability to stay or transfer common claims, and *amici* are unaware of data that would illuminate just how many protective class actions would be filed if Petitioner's rule prevails. But *amici* believe there is no reason to tempt fate when other solutions are readily available.

## II. DENYING *AMERICAN PIPE* TOLLING TO FOLLOW-ON CLASS ACTION CLAIMS WOULD LIKELY LEAD TO AN INCREASE IN DUPLICATIVE INDIVIDUAL FILINGS BY ABSENT CLASS MEMBERS OF A PRIOR PUTATIVE CLASS THAT WAS NOT CERTIFIED

Amici are also concerned that Petitioner's proposed rule would create problems of case management and fairness in the post-tolling period, when individual claims remain cognizable but class claims, according to Petitioner, are extinguished. Like many class-action defendants, Petitioner no doubt believes that the elimination of the class action device will result in reduced liability and expense because only a small fraction of absent class members will file individual claims. This may well be true, because one of the chief purposes of Rule 23 is to provide a mechanism for adjudicating claims that are too small to pursue on an individual basis. But it is difficult to justify Petitioner's rule on an abstract scale of justice. Under the rule adopted by the Ninth Circuit in this case, a defendant will be subject to what is effectively an extended statute of limitations for both class actions and individual actions—actions raising issues that the defendant already knows about from the prior action in which a class was not certified. On the other

hand, were Petitioner to prevail, plaintiffs with small-value claims would effectively be left without any meaningful remedy because the cost of filing and pursuing an individual claim exceeds its potential benefit. Weighing those two outcomes, fairness suggests that class actions should be allowed.

If, however, individual claims of absent class members are cost effective, then presumably many will be filed within the limitations period tolled under *American Pipe*. Here too it is difficult to see why the elimination of the class device is prudent or fair. For district judges, the management of a single class action is usually easier than 1,000 individual actions filed by individuals who would ordinarily be members of a class. Indeed, as a condition of certifying a class under Rule 23(b)(3), a district court must find that a class action would be a superior method for fairly and efficiently adjudicating the controversy. For plaintiffs as well the benefits are obvious. But even defendants have some grounds to retain the class device in this situation. In some cases defendants may prefer a class action over manifold individual actions. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (where defendant argued that most washing machine purchasers did not experience mold problems, "that was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears—a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment"). In many cases the class device permits a class settlement that is the optimal result for all parties. In addition, class actions are sometimes asserted as counterclaims, in particular in

response to debt collection actions by large corporations. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008). Eliminating that possibility could leave consumers without an important defense in some situations. Rule 23 also permits "defendant class actions," in which the plaintiff impels a group of defendants to litigate as a class. See 2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 5:3 (5th ed. 2012) (observing that certain securities cases are litigated as defendant class actions because of economies achieved by one rather than multiple determinations of whether a registration statement contained a material misrepresentation). It is not clear what if any effect Petitioner's proposed rule would have on such actions. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue *or be sued* as representative parties ....") (emphasis added).

*Amici* believe Petitioner's proposed rule would impair the symmetry and balance of Rule 23 in particular and the Federal Rules of Civil Procedure as a whole. Eliminating one component of the rules from certain types of actions will lead to mischief and injustice in particular situations. *Amici* believe it is better to allow litigants to avail themselves of all forms of actions allowed under the Federal Rules, and let the district courts decide, on a case-by-case basis, the litigation form that promotes a just, speedy, and inexpensive resolution. Fed. R. Civ. P. 1.

Again, *amici* cannot quantify the number of individual post-tolling filings that are likely to occur if this Court were to reverse the decision below and hold that a subsequent class action cannot benefit from *American Pipe* tolling. But from the standpoint

of efficient judicial administration, denying litigants access to Rule 23 is likely to force district courts to manage more, essentially identical claims, or will leave individuals with smaller claims without a practical mechanism for pursuing redress.

## III. DISTRICT COURTS UTILIZE A VARIETY OF TOOLS, INCLUDING COMITY, TO ADDRESS AND PREVENT THE ENDLESS RE-LITIGATION OF CLASS CERTIFICATION

Petitioners refer to comity as a "loose doctrine" with the potential to prevent duplicative class litigation that is "weak at best." Pet. Br. at 49. But a doctrine that is subject to the discretion of district courts is not thereby toothless: courts recognize that judicial efficiency and avoiding conflicting judgments among federal courts are important values, and apply comity-based doctrines to further those objectives. *E.g.*, *EEOC v. Univ. of Pa.*, 850 F.2d 969, 971-72 (3d Cir.1988) (discussing contours of "first-filed" rule); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (in relations among federal district courts, "the general principle is to avoid duplicative litigation"); *Church of Scientology of Cal. v. United States Dep't of the Army*, 611 F.2d 738, 750 (9th Cir. 1979) (applying comity doctrine flexibly to defer to decision in later-filed action in another district, recognizing that the purpose of comity is "to avoid placing an unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments") (citation omitted), overruled on other grounds, *Animal Legal Defense Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016).

And district courts' decisions in wake of *Smith v. Bayer* show that district courts have taken seriously this Court's instruction to exercise comity. Decisions on follow-on class actions confirm that the district courts are fully capable of limiting repeat litigation of failed class claims, while making considered judgments about follow-on class claims that differ in a meaningful respect from the prior failed class and thus are inappropriate for summary rejection. Respondents' brief (at 41-43) identifies examples of both types. For example, in *Baker v. Home Depot USA, Inc.*, No. 11 C 6768, 2013 WL 271666, at *5 (N.D. Ill. Jan. 24, 2013), the plaintiffs brought class claims on behalf of purchasers of chemically treated wood. The defendant moved to strike the class claims, asking the court to apply principles of comity to decisions of five other courts that had declined to certify a class in "materially identical" cases. The district court granted the motion, finding that the class allegations suffered the same deficiencies under Rule 23(a) and 23(b)(3) as the other cases. And in *Ott v. Mortg. Investors Corp. of Ohio, Inc.*, 65 F. Supp. 3d 1046, 1063-64, 1066 (D. Or. 2014), the district court considered itself "compelled to honor the principles of comity" "in order to save the resources of the courts and parties." The *Ott* court viewed the denial of certification of the same class in a prior case as setting "a rebuttable presumption against certification of the same classes in this court."[3] Even

[3] As Respondents note, the American Law Institute has suggested a standard by which to exercise comity: a district court should give a "rebuttable presumption" of correctness to a prior court's non-certification decision when deciding whether to certify a similar class. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. reporter's notes (AM. LAW INST. 2010).

though, "were th[e] court writing on a clean slate, it would agree with plaintiffs' interpretation" of the law, the district court applied comity to follow the prior decision of a fellow district court in the Ninth Circuit and dismissed the plaintiff's class claims.

On the other hand, comity does not (and should not) require that district courts give dispositive weight to the decisions of prior courts addressing the certification of a similar, even identical class, particularly where such prior decisions rest on grounds that do not go to the fundamental certifiability of the class. Thus, in the wake of *Smith v. Bayer*, district courts have also found sound reasons to break from past decisions where the follow-on case is distinguishable in a meaningful respect. *See, e.g., Heibel v. U.S. Bank Nat'l Ass'n*, No. 2:11-CV-00593, 2012 WL 4463771 (S.D. Ohio Sept. 27, 2012).

When a district court agrees, in the exercise of comity, that a follow-on class action suffers similar or identical defects as a prior failed class, the Federal Rules give the court procedural tools to prevent further re-litigation of class certification. *See* Fed. R. Civ. P. 12(f); Fed. R. Civ. P. 23(d)(1)(D) (district court may issue orders that "require that the pleadings be amended to eliminate allegations about representation of absent persons").

*Amici* reiterate that they are neutral about the substantive issues raised by the parties in this litigation. Based on their collective experience and

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*See also Baker v. Microsoft Corp.*, 797 F.3d 607, 617-19 (9th Cir. 2015) (Bea, J., concurring in the result), *rev'd and remanded on other grounds*, 137 S. Ct. 1702 (2017).

judgment, however, *amici* believe that affirming the court below and finding that *American Pipe* tolling applies to claims brought under Rule 23, not just individual actions, would facilitate the efficient administration and management by district courts of the disputes brought before them.

## CONCLUSION

For the reasons stated, the Court should sustain the decision below.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## List of *Amici*

**The Hon. Frank C. Damrell, Jr. (ret.)** served on the United States District Court for the Eastern District of California from 1997 to 2011. He served on the Judicial Panel on Multidistrict Litigation from 2008 to 2011. Judge Damrell is currently a mediator and arbitrator with JAMS.

**The Hon. William Royal Furgeson, Jr. (ret.)** served on the United States District Court for the Western District of Texas from 1994 to 2013. He served on the Judicial Panel on Multidistrict Litigation, was President of the Federal Judges Association, and was a member of the Judicial Resources Committee of the Judicial Conference of the United States. Judge Furgeson is currently Dean of the University of North Texas at Dallas College of Law.

**The Hon. Nancy Gertner (ret.)** served on the United States District Court for the District of Massachusetts from 1994 to 2011. Judge Gertner is currently a Professor of Practice at Harvard Law School.

**The Hon. G. Patrick Murphy (ret.)** served on the United States District Court for the Southern District of Illinois from 1998 to 2013, including serving as chief judge from 2000 to 2007. Judge Murphy is currently a partner at Murphy & Murphy, LLC.

**The Hon. T. John Ward (ret.)** served on the United States District Court for the Eastern District of Texas from 1999 to 2011. He served on the Judicial Conference Committee on Court Administration and Court Management from 2003 to 2009. Judge Ward is currently Of Counsel to Ward Smith & Hill, PLLC.

**The Hon. Alexander Williams, Jr. (ret.)** served on the United States District Court for the District of Maryland from 1994 to 2014. Judge Williams is currently on the faculty of the Howard University Law School.

No. 17-432

IN THE

# Supreme Court of the United States

CHINA AGRITECH, INC.,

*Petitioner,*

*v.*

MICHAEL RESH, ET AL.,

*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER


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## INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is comprised of hundreds of member securities firms, banks, and asset managers. Because its members are frequent targets of securities class action litigation, SIFMA has an interest in the efficient and timely resolution of these lawsuits. That interest is furthered by securities laws—including federal statutes and the judicial decisions that interpret them—that aim to strike the right balance between allowing investors to pursue meritorious claims on a timely basis, and protecting defendants from frivolous filings or the protracted threat of liability.

Respondents' position in this case—that a ruling that dismisses a putative class action plaintiff's claims or rejects class treatment, made after the statute of limitations has run, does not foreclose formerly absent class members from subsequently filing new, otherwise untimely class actions—raises an issue of particular importance to the securities industry. Respondents' position, if accepted by this Court, would upset the delicate balance of interests created by Congress and lead to abusive and protracted class action litigation—with profound harm on SIFMA's members, the judiciary, and the

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[1] All parties have consented to this filing in letters on file with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief.

national economy without corresponding benefit to investors.

## SUMMARY OF ARGUMENT

SIFMA supports Petitioner's arguments that the tolling doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not permit a formerly absent class member to bring a subsequent class action outside the applicable limitations period. While the implications of the Court's decision in this case will impact class actions in all areas of law, SIFMA submits this brief to highlight the problems posed by Respondents' perpetual tolling rule from the perspective of the securities industry.

I. Respondents' tolling rule results in adverse policy consequences that do not arise when tolling is limited to individual actions. As multiple courts of appeals have observed, recognizing tolling for subsequent class actions invites abusive litigation. Even if plaintiffs' claims are unquestionably inadequate or unsuitable for class treatment, plaintiffs are free to hit (and re-hit) the replay button until they find a court willing to see things differently. The result of Respondents' proposed rule, therefore, would be abuse of defendants and the federal courts. While this danger would be present in all types of class actions, it would be particularly acute in the context of securities class actions, where the negative consequences of excessive litigation are well-recognized. This Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities,*

*Inc.*, 137 S. Ct. 2042 (2017), underscores these points, as the Court highlighted the particular danger posed by limitless litigation in the securities industry in refusing to allow an untold number of subsequent actions to piggyback off of one timely-filed securities class action. Respondents' tolling rule would also impede the settlement of class actions and result in protracted securities litigation, which would harm the parties, the courts, investors, and the American taxpayer.

II. A rule that would allow a formerly absent class member to file an otherwise untimely class action years after the outset of the litigation pursued by a previously appointed lead plaintiff would also undermine Congress's carefully-crafted framework for efficiently and fairly prosecuting class claims. More than two decades ago, Congress enacted the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "PSLRA"), to curb what it identified as abusive, lawyer-driven securities litigation. Among the many reforms that the PSLRA put in place were detailed mechanisms for consolidating similar class actions and appointing a "lead plaintiff," which were aimed at preventing duplicative lawsuits and shifting the balance of power to control the litigation from counsel to the most adequate class representative. The system that the PSLRA has developed is a product of both statutory language and judicial interpretation: the statute provides for lawsuits asserting similar claims to be consolidated and a single lead plaintiff to be chosen early in the litigation, and courts have vested that representative with complete authority over the

litigation. Defendants, in turn, are provided with a level of certainty concerning the nature and content of the class claims early in the litigation, allowing them to plan their defenses and gather necessary evidence while it is still fresh.

By contrast, Respondents' proposed regime would upend this balance by allowing a formerly absent class member to surface years after the outset of the litigation—after another plaintiff had been chosen as the lead plaintiff and after the statute of limitations had lapsed—and surprise defendants with a separate class complaint. The prejudice to defendants, moreover, is not offset by any benefit, as Respondents' stated goal of avoiding duplicative class action filings at the start of the litigation is already accomplished by the procedures for consolidation in the Federal Rules, the multi-district litigation process, and the PSLRA.

In addition to undermining the PSLRA, Respondents' tolling rule undercuts the established procedure for interlocutory appellate review of class certification decisions under Rule 23(f). The Federal Rules already provide an avenue for putative class members to challenge a ruling denying class certification, one that can be used only in limited circumstances. Respondents' proposed regime, however, would permit plaintiffs to challenge an unsatisfying class certification order over and over simply by filing a new, otherwise untimely class action lawsuit as soon as class certification is denied in the first case. Plaintiffs may thus re-litigate class certification

before the same district court judge (or even a judge in another district) innumerable times.

III. This potential for abusive, protracted, and inefficient litigation would not be mitigated by a rule permitting tolling only in limited circumstances, or by the presence of non-tollable statutes of repose in certain securities laws. A rule allowing plaintiffs to re-litigate class actions to cure "representative-specific" defects—for which this Court's class-action jurisprudence provides no authority—would have the same potential for abuse as a more expansive tolling rule. As for statutes of repose, whether or not a statute of limitations is coupled with a statute of repose, statutes of limitations are designed to achieve a separate and critical purpose: to require diligent prosecution of known claims. Respondents' rule frustrates this congressional goal and makes the statute of limitations virtually illusory by allowing a plaintiff who knows of a claim to sit on the claim and refrain from taking any action not just during the (shorter) limitations period, but for the entirety of the (longer) repose period.

## ARGUMENT

### I. EXTENDING *AMERICAN PIPE* TOLLING TO SUBSEQUENT CLASS ACTIONS WOULD HAVE PERNICIOUS EFFECTS IN SECURITIES CLASS ACTIONS

A decision extending *American Pipe* to authorize otherwise untimely subsequent class actions would have adverse consequences that do

not arise when tolling is limited to individual actions, including generating abusive or open-ended litigation and impeding settlement of class actions. Though these consequences would be felt in all kinds of class actions, they are particularly troublesome in the context of securities class actions.

### A. Tolling Would Breed Abusive Securities Litigation (and Re-litigation)

"The tolling rule of *American Pipe* is a generous one, inviting abuse." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring); *see also Am. Pipe & Constr. Co.*, 414 U.S. at 561 (Blackmun, J., concurring). Respondents' proposed extension of the rule poses just such dangers, particularly in the securities class action context.

1. Respondents' perpetual tolling rule would "afford plaintiffs the opportunity to argue and reargue the question of class certification" or a dismissal motion "by filing new but repetitive complaints" as soon as the prior class action is dismissed or class action certification is denied. *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987). Plaintiffs' lawyers could continue to stack one meritless class action on top of another—actions that describe the same events, assert the same class, and contain the same shortcomings under Rules 12(b)(6) and 23—until they find a court that is willing to sustain the complaint or certify the class. *Yang v. Odom*, 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J., concurring and dissenting); *see also*

*Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1326 (11th Cir. 2015) (reasoning that a perpetual tolling rule "would allow a purported class almost limitless bites at the apple as it continuously substitutes named plaintiffs and relitigates the class certification issue"); *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11-12 (1st Cir. 1998) (describing the danger of abuse presented by allowing potential class members to stack subsequent class actions to stretch out limitations periods); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (same).

2. This danger of abuse is particularly acute with respect to securities class actions, which "pose a special risk of vexatious litigation," to the detriment of the national economy. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006).

a. It was "significant evidence of abuse in private securities lawsuits" that prompted Congress, in 1995, to pass the PSLRA. H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730; *see also Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068 (2014); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 320-22 (2007); *Dabit*, 547 U.S. at 81-82 (2006). The House and Senate Committees that adopted the PSLRA heard evidence that class action lawyers were routinely filing fishing-expedition lawsuits "whenever there [was] a significant change in an issuer's stock price, without regard to any underlying culpability of the

issuer," and abusing the discovery process to extort costly settlements of these meritless claims. H.R. Rep. No. 104-369, at 31. Congress concluded that these abuses and others were injuring "the entire U.S. economy." *Id.* at 31-32.

b. In the twenty-plus years since then, frequent securities litigation has continued to threaten the health of the national economy. Securities class actions impose large—and growing—costs on American businesses and their investors. *See, e.g.*, Stefan Boettrich & Svetlana Starykh, NERA, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (2017) ("NERA 2016 Report"), at 28-29 (Jan. 23, 2017) (reporting that, in 2016, the average settlement amount exceeded $72 million, nearly double the number from just two years before); Mukesh Bajaj et al., U.S. Chamber Institute for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation*, at 2-3 (2014) (concluding that shareholders lose $39 billion annually upon the announcement of securities class action lawsuits—nearly eight times the annual average of $5 billion that they collect in settlements). These costs have made U.S. capital markets less attractive to companies considering where to list their securities and may now be deterring companies from going public at all. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The Problem, Its Impact, and the Path to Reform*, at 9-14 (2008); U.S. Chamber Institute for Legal Reform, *Securities Class Action Lawsuits: More Common and More Lucrative* (May 25, 2017), http://www.institute

forlegalreform.com/resource/securities-class-action-lawsuits-more-common-and-more-lucrative.

c. Allowing plaintiffs to litigate and re-litigate the same securities class action until they strike success would impede Congress's effort to reign in abusive securities litigation at a critical time when federal securities class actions are *already* on the rise. In 2016, 300 such actions were filed, the highest of any year since 2001. *See* NERA 2016 Report, at 2. As for 2017, plaintiffs filed 226 federal securities class actions in the first half of the year alone—the most filings on record since the enactment of the PSLRA. *See* Cornerstone Research, *Securities Class Action Filings: 2017 Midyear Assessment*, at 1 (2017). In the face of rising litigation, the securities laws should continue to discourage the filing of meritless lawsuits.

3. The Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), underscores these points. Just last Term, the Court rejected the argument that "the bringing of [a] class action would make any subsequent action raising the same claims timely." *Id.* at 2054. Of course, that is *precisely* the import of a perpetual tolling rule that would allow plaintiffs to stack one class action after another until the complaint is finally sustained or the class finally certified. Equally to the point, the Court also recognized, once again, the particular danger posed by limitless litigation in the securities context, observing that "certainty and reliability . . . are a necessity in a marketplace where stability and reliance are essential components of valuation

and expectation for financial actors." *Id.* at 2055; *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994) (observing that the securities laws are "an area that demands certainty and predictability" (internal quotation marks omitted)). The same considerations warrant rejecting Respondents' identical argument in this case.

### B. Tolling Would Impede Settlement of Class Actions, Including Securities Class Actions

Respondents' tolling rule would also make it more difficult to efficiently settle class actions, including securities class actions. Empirical evidence demonstrates that federal securities cases where motions for class certification are filed are resolved *after* the district court rules on the motion *over half the time*. *See* NERA 2016 Report, at 22. As Petitioner explains, this makes sense: Plaintiffs typically have little incentive to settle claims while a motion for class certification is pending, as the value of their claims could go up if the motion is granted. But they have a strong incentive to settle or dismiss their claims if their motion is denied, as the value of their claims would be greatly diminished. Under Respondents' proposed regime, however, a decision denying class certification would no longer be a potential inflection point at which the dispute might be settled. It would instead be an invitation to try to certify an identical class led by different named plaintiff. *See* Pet. for Writ of Cert. ("Pet."), at 26.

The parties, the courts, investors, and the American taxpayer suffer when securities lawsuits are prolonged and resources are expended needlessly. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1540-41 (2006) (explaining that federal securities class actions "consume significant judicial resources" and are thus "essentially subsidized by the U.S. taxpayer"). As a result, this Court has stated that it "would reject any theory" that raised the prospect of "protracted" litigation under the securities laws. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1106 (1991). A theory that extends *American Pipe* to subsequent class actions should be no exception.

## II. RECOGNIZING TOLLING FOR SUBSEQUENT SECURITIES CLASS ACTIONS WOULD UNDERMINE THE PSLRA AND RULE 23(F)

Apart from producing pernicious policy consequences, extending *American Pipe* to allow a formerly absent class member to file an otherwise untimely class action years after the outset of the litigation undermines the PSLRA and Rule 23(f) to solve a non-existent problem.

A. Among the many reforms that the PSLRA put in place to curb abusive securities lawsuits was the "lead plaintiff" provision, which took aim at a significant source of the abuse: duplicative, "lawyer-driven litigation." *Tellabs*, 551 U.S. at 322. Under the pre-PSLRA regime, plaintiffs' lawyers were incented to "race to the courthouse" with

competing lawsuits brought in the names of figurehead plaintiffs with little-to-no interest in representing a plaintiff class. *See* H.R. Rep. No. 104-369, at 33. Congress's solution to this problem was a detailed mechanism requiring the first to file to provide early notice to members of the proposed class of their right to move the court to lead the class, thereby encouraging other persons who wanted to serve as lead plaintiff to come forward early and file a motion or complaint in the first-filed matter. Congress also required the district court to choose the most capable representative from among the applicants as the lead plaintiff after a thorough vetting process. *See* 15 U.S.C. § 78u-4(a)(3). In the likely scenario where multiple identical (or nearly identical) class actions have been filed, Congress provided that the district court must rule on any motion to consolidate before appointing a lead plaintiff. *See id.* § 78u-4(a)(3)(B)(ii).

The PSLRA thus seeks to achieve Congress's goal of curbing duplicative, lawyer-driven litigation by encouraging all interested parties to apply to serve as lead plaintiff at the early stages of the case, providing for the consolidation of similar class actions, and "empower[ing]" the single most adequate lead plaintiff "to exercise control over the litigation as a whole." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82 n.13 (2d Cir. 2004); *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 192 (3d Cir. 2005). For example, the lead plaintiff has the authority to decide which claims to assert and allegations to make on behalf of the class, and those decisions are binding during the pendency of

the original class action; other plaintiffs cannot bring separate class actions during that time, with separate lead plaintiffs and separate lead counsel, that assert claims or make allegations that the lead plaintiff decided not to pursue. *See, e.g., In re Bank of Am. Corp. Sec., Derivative & Emp't Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MDL 2058 (DC), 2010 WL 1438980, at *1-3 (S.D.N.Y. Apr. 9, 2010). Plaintiffs are welcome, of course, to bring these claims individually—just not on behalf of others.

From the other side of the "v.", allowing one lead plaintiff to prosecute one consolidated class complaint provides defendants with more certainty about the scope of the class, the nature of the class claims, and the alleged facts that support those claims at a relatively early stage in the litigation. The defendants will know, for example, that they face a claim under Section 11 of the Securities Act but not Section 10(b) of the Exchange Act and that certain corporate disclosures during the class period are alleged to be false and misleading while others are not. Armed with this knowledge, defendants can mount their best defenses and preserve and collect the evidence needed to do so.

Essentially, therefore, Congress created a system where, at the outset of class action litigation: (1) all plaintiffs that want to lead the class surface; (2) all related class actions are consolidated; (3) the district court chooses the most capable representative from among the potential plaintiffs to serve as the lead plaintiff; (4) the lead plaintiff charts the course of the litigation; and

(5) defendants have information they need to plan their defenses.

B. Recognizing tolling for subsequent securities class actions would needlessly undermine Congress's carefully-crafted system and could result in undue prejudice to defendants.

1. Respondents seek the right to have a formerly absent class member—one who did not even move to serve as lead plaintiff when litigation first was filed—file and lead a new class action, perhaps even in a new court, years after the outset of the litigation and after the statute of limitations has run. Because this new lawsuit would be filed after the first set of class action lawsuits had been dismissed, there would be no existing lawsuits with which the new lawsuit could be consolidated, and it would thus subsist as a separate complaint. This proposed regime could result in pernicious outcomes. The new plaintiff no doubt would argue that he is the master of his own complaint and of his own action and that decisions and strategic choices made by any other named plaintiff in a prior dismissed case are not binding on him. Defendants, in turn, would be put in the position of having to defend against allegations that may have been tangential in the prior complaint many years after the alleged fraud occurred. For example, the new lead plaintiff may focus its Section 11 claims on *different* alleged misstatements. To defend against this new emphasis of the prior claim, defendants may have to collect entirely new evidence—for example, that the plaintiff "knew of" the alleged misstatement, 15 U.S.C. § 77k(a), or

that the misstatement caused no loss to that plaintiff, 15 U.S.C. § 77k(e). Documentary evidence, however, may already be lost, and recollections may not be as fresh, meaning that defendants are deprived of the ability to mount a defense.

2. These costs come with no corresponding benefit to investors or the court system. Respondents assert that their proposed rule aims to keep "class member[s] [from] multiply[ing] litigation by filing [class action] suits . . . at the outset of the initial class action," lest the weight of these filings crush the courts. Br. of Resp'ts in Opp'n to Pet. for Writ of Cert. ("Opp."), at 22. The PSLRA, the Federal Rules, and the multi-district litigation process, however, already provide established procedures for managing the existence of multiple class plaintiffs and class actions. *See* Pet. 24-25; Reply Br. of Pet'r in Supp. of Pet. for Writ of Cert. ("Reply"), at 11. Indeed, the PSLRA *encourages* multiple class plaintiffs to come forward early in the litigation; healthy competition for the lead plaintiff position helps ensure that the chosen plaintiff will take the wheel from counsel and steer the litigation in the direction of the class's best interests.

3. While it is possible for a new lead plaintiff to file a new class complaint years after the litigation has started but before the limitations period has lapsed (like the *Smyth* action in this case), Congress has limited the time period within which such a new complaint could be filed. Even then, the fact that Congress's system occasionally

functions less-than-ideally is no reason to adopt a rule that would cripple it completely. To the contrary, strict enforcement of the statute of limitations is necessary to prevent this abusive practice from becoming commonplace or aggravated. All parties involved benefit when the appropriate class representative and class counsel are chosen to prosecute a class action once and for all early in the litigation (and certainly within the statute of limitations period); plaintiffs receive vigorous representation of their interests, defendants needed certainty, and the courts the ability to adjudicate the same or similar claims most efficiently. Tolling rules must promote, rather than undermine, these goals.

C. Respondents' proposed rule also undermines the Federal Rules by permitting plaintiffs to circumvent the established procedure for interlocutory appellate review of class certification decisions. *See* Fed. R. Civ. P. 23(f). Under Rule 23(f), a court of appeals may permit an appeal from an order denying (or granting) class certification only under limited circumstances, and the courts often choose not to: indeed, one study found that only twenty-three percent of the petitions for interlocutory appeal filed since 2012 have been accepted by the courts of appeals. *See* Bloomberg Law, *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource* (Mar. 16, 2017), https://www.bna.com/interlocutory-appeal-class-n57982085304/. Thus, while the district court's decision on class certification is generally not revisited during the pendency of the district court litigation, Respondents' proposed rule

would permit plaintiffs to challenge that ruling over and over again by the expedient of filing a new class action lawsuit before a new judge and with new evidence.

Once again, this evil is particularly pronounced in securities class action lawsuits. For example, in a Rule 10b-5 class action, plaintiffs may satisfy the reliance element by invoking a rebuttable presumption of class-wide reliance based on the "fraud-on-the-market" theory. *See Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), 134 S. Ct. 2398, 2408 (2014); *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). In order to benefit from the presumption, plaintiffs are subject to a three-phase burden-shifting regime where: (1) plaintiffs must prove, among other predicates, that the security traded in an efficient market, which they may do by showing that the security price generally reflects public, material information; (2) defendants are able to rebut plaintiffs' general proof of market efficiency by showing that the security price did not reflect the particular alleged misstatements; and (3) plaintiffs then counter that evidence with evidence that it did. *See Halliburton II*, 134 S. Ct. at 2415-16. As this Court has recognized, proof of the requisite "market efficiency" is offered in the form of fact-intensive expert evidence, such as complex regression analyses that seek to show that the security price takes account of public, material information about the company, including the misstatements at issue. *See id.* Plaintiffs are incentivized to develop and offer their best evidence from the get-go; if, as happens, the district court rejects plaintiffs' expert or finds plaintiffs' evidence

insufficient to satisfy their burden, the class certification question is resolved—subject only to the court's discretionary determination whether to deny without prejudice. Under Respondents' proposed regime, by contrast, plaintiffs have the luxury to test novel theories or argue for a relaxed burden of proof, safe in the understanding that, if the district court rejects their more creative arguments, (unlikely) appellate review will not be their only recourse. Rather, they could litigate the question of market efficiency over and over again, each time offering more conventional and more well-developed evidence, until they find a district court judge willing to certify the class.

## III. NEITHER A LIMITED TOLLING RULE, NOR A STATUTE OF REPOSE, IS THE SOLUTION

The harmful consequences of Respondents' proposed expansion of *American Pipe* would not be mitigated by a tolling rule that allows successive class actions only in limited circumstances, or by the presence of non-tollable statutes of repose in certain securities laws.

### A. Permitting Subsequent Class Actions to Cure "Representative-Specific" Defects Would Not Eliminate Abuse

A tolling rule that would allow successive class actions only in limited situations—where the district court denied class certification based on a "representative-specific," rather than a "class-specific," defect—finds no support in this Court's precedents and invites the same abusive and

protracted litigation as a more expansive tolling rule.

1. This Court's precedents do not support a tolling rule that relies on an artificial distinction between representative-specific and class-specific defects. To the contrary, this Court has recognized that representative-specific issues bleed into class-specific ones. This Court has stated, for example, that Rule 23's "adequacy-of-representation requirement tend[s] to merge with [its] commonality and typicality criteria." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (first alteration in original) (internal quotation marks omitted). More recently, this Court has explained that adequacy of representation is the common thread linking all of Rule 23(a)'s requirements: "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (internal quotation marks omitted). Thus, any shortcoming in the ability of the named plaintiff to represent the class *is* a class-specific shortcoming—and any class action plagued by a "representative-specific" defect is just as unworthy of resuscitation as one suffering from a "class-specific" problem.

2. Assuming that one can neatly carve Rule 23 into representative- and class-specific

prerequisites, a perpetual tolling rule that applies only where class certification was denied based on a representative-specific defect still encourages protracted and abusive litigation.

a. As an initial matter, a rule that turns on the basis for the denial of class certification would not address the potential for abuse arising from the re-litigation of an adverse ruling on a pre-certification motion to dismiss. But the same is true even when the subsequent class action seeks to re-litigate class certification. As then-Judge Alito recognized, district courts may not always make it clear whether their rulings denying class certification rest on representative- or class-based problems. *See Yang*, 392 F.3d at 114 (Alito, J., concurring and dissenting). Seizing on the ambiguity, class action lawyers could re-characterize class-specific defects into representative-specific ones, *see id.*, resulting in costly and time-consuming litigation over this threshold issue. The proceedings in this case well illustrate this point: Respondents characterize the first round of class plaintiffs' failure to establish predominance under Rule 23(b)(3) as a "plaintiff-specific failure in an expert report," while Petitioner calls the problem a class-wide defect. Opp. 5; Reply 2 n.1.

Moreover, even if district courts' orders are crystal-clear on this point, there is little difference between permitting plaintiffs to re-litigate the adequacy of the class representative after the statute of limitations has run and allowing the untimely re-litigation of any other Rule 23 issue. "Endless rounds of litigation" could result in either

case as plaintiffs "piggyback one class action onto another" until they prevail. *See Ewing Indus. Corp.*, 795 F.3d at 1328 (internal quotation marks omitted).

b. To be sure, application of the statute of limitations to prevent successive class action lawsuits would prohibit a second class action even in those cases where the would-be class was simply "unlucky enough to rely upon an inappropriate lead plaintiff." *Yang*, 392 F.3d at 111. But the Court need not rewrite *American Pipe* to avoid that result. Even without the extension of *American Pipe* sought by Respondents, a new class action lawsuit can be filed within the statute of limitations period if the first lead plaintiff is determined to be inappropriate. Perhaps more to the point, as demonstrated above, pursuant to the PSLRA, each member of the would-be class receives notice, at the very beginning of the litigation, of the pendency of the lawsuit and an invitation to file his own class action lawsuit and to move the court to serve as the lead plaintiff. A formerly absent class member who surfaces years later either ignored this notice or affirmatively decided that it did not want to pursue claims on behalf of the class. In either case, the formerly absent class member should not benefit from *American Pipe* tolling, regardless of why the court denied class certification.

### B. Statutes of Repose Are at Best a Weak Barrier to Re-litigation of Meritless Class Certification Issues, and No Substitute for Statutes of Limitations

Finally, Respondents' argument that this Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017)—which held that *American Pipe* tolling does not apply to statutes of repose—has "mitigated[,] if not rendered moot," concerns about endless re-litigation in class actions, Opp. 3, is incorrect.

1. *First*, as Petitioner points out, statutes of repose—or absolute time bars—are relatively rare in federal statutes. *See* Reply 6. Most statutory schemes consist of a single limitations period without an additional outer limit to safeguard against serial litigation. Thus, in many class action contexts, the supposed protection against abuse that *CalPERS* provides is nonexistent.

2. *Second*, while Congress has adopted statutes of repose in a number of federal securities laws,[2] the fact that these time bars are non-tollable under

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[2] *See, e.g.*, 28 U.S.C. § 1658(b)(2) (five-year repose period applicable to securities fraud claims under Section 10(b) of Exchange Act); 15 U.S.C. § 77m (three-year repose period applicable to claims under Sections 11 and 12(a)(2) of Securities Act); 15 U.S.C. § 78i(f) (three-year repose period applicable to price manipulation claims); 15 U.S.C. § 78r(c) (three-year repose period applicable to claims under Section 18 of Exchange Act); 15 U.S.C. § 78p(b) (two-year repose period applicable to short-swing profit claims).

*CalPERS* does little to assuage concerns about needless re-litigation of class actions. The pairing of a shorter (tollable) statute of limitations with a longer (non-tollable) statute of repose gives plaintiffs a window of opportunity in which to squeeze new lawsuits, if the district court grants a motion to dismiss or denies class certification somewhere in the middle.

a. This case illustrates the point. Respondents brought a third identical securities class action after the applicable two-year limitations period was up but before the five-year repose period blocked it. *See* 28 U.S.C. § 1658(b). If *American Pipe* applies to successive class actions, Respondents' repeat action is timely despite the presence of a non-tollable repose period in the statutory scheme.

b. Empirical evidence demonstrates that this case is not an anomaly. According to a recent study of securities class actions filed in the period from 2002 through 2009, in cases that asserted claims under Section 10(b) of the Exchange Act and reached a certification decision (like this case), the applicable five-year statute of repose lapsed before the court ruled on class certification in only forty-four percent of cases. *See* David Freeman Engstrom & Jonah B. Gelbach, American Pipe *Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 Stan. L. Rev. Online 92, 98 (2017). This data suggests that the non-tollable time bar is an ineffective barrier to re-litigation in as many as *over half* of Section 10(b) cases in which plaintiffs' first try at class certification fails. Similarly, even in cases that asserted claims under

only Section 11 or Section 12 of the Securities Act, which are subject to a shorter three-year statute of repose, that statute had not expired in over *one quarter* of the cases that reached a class certification ruling. *See id.* Thus, in many cases, the statute of repose does not stand in the way of serial litigation.

The statute of repose is an even weaker barrier to re-litigation following the dismissal of a class action complaint, which generally occurs earlier in the litigation than the denial of a class certification motion. Indeed, half the cases dismissed in 2016 were done so within *less than one year* of filing, the fastest pace since the passage of the PSLRA. *See* NERA 2016 Report, at 24. Thus, plaintiffs are left with plenty of opportunity to file new class actions before either a three-year or a five-year statute of repose expires.

3. *Third*, Respondents' rule accords insufficient respect to the independent role that Congress intended statutes of limitations to serve in the federal securities laws. Statutes of limitations are "designed to encourage plaintiffs to pursue diligent prosecution of known claims." *CalPERS*, 137 S. Ct. at 2049 (internal quotation marks omitted). Thus, in cases alleging claims under Section 10(b) of the Exchange Act, the two-year statute of limitations ensures that all potential plaintiffs who know, or could have known, of a claim bring their claim within a two-year period. 28 U.S.C. § 1658(b)(1). The five-year statute of repose, in turn, functions as a limited safety net that protects plaintiffs who *do not know*, or *could not have known*, of a claim

through no fault of their own; under the current regime, those plaintiffs receive the benefit of equitable tolling so that they may bring their claim within five years. *Id.* § 1658(b)(2); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). *American Pipe* tolling permits those plaintiffs who otherwise would timely file their own independent claims to forbear from doing so during the limitations period in reliance on the understanding that a class certification motion will be granted.

Respondents' argument, however, turns on its head *American Pipe* tolling and would make the statute of limitations virtually illusory. Under their view, a plaintiff who knows of a claim and otherwise would be required to bring it timely can sit back and refrain from taking any action to diligently prosecute its claims for an extended time period. As long as one class action is timely filed within the two-year limitations period, all putative class members can hold back and not bring any claim, safe in the understanding that if one court determines that the first putative action does not provide a basis for class-wide relief, another plaintiff will step forward and bring a new action within five years. The two-year statute of limitations would no longer have any real meaning.

## CONCLUSION

For the foregoing reasons, SIFMA urges the Court to reverse the judgment of the Circuit Court.

Respectfully submitted,

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No. 17-432

In The
# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner,*

v.

MICHAEL RESH, ET AL.,
*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit, public-interest law firm and policy center with supporters in all 50 States.[1] Founded 41 years ago, WLF devotes a substantial portion of its resources to advocating for free-market principles, individual and business civil liberties, limited government, and the rule of law.

To that end, WLF has regularly appeared before this and other federal courts in numerous cases raising issues related to the proper scope of the federal securities laws. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) (No. 13-435); Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317).

In particular, WLF has participated in litigation regarding the applicability of the statutes of limitations and statutes of repose for the bringing of securities law claims. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Respondents, *Cal. Pub. Emps Ret. Sys. v. ANZ Secs., Inc., et al*, No. 16-373; Brief of Washington Legal

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioner or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

Foundation as *Amicus Curiae* in Support of Petitioner, *Kokesh v. SEC*, No. 16-529; Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Timbervest LLC v. SEC*, No. 15-1416 (D.C. Cir. appeal docketed Nov. 13, 2015).

Additionally, WLF's Legal Studies Division, the publishing arm of WLF, has published numerous studies, reports, and analyses on issues related to statutes of limitations and statutes of repose. *See, e.g.*, Eric J. Conn, *OSHA's Midnight Attempt to Overrule Federal Court's Decision Is Ripe for Rescission*, WLF Legal Opinion Letter, Feb. 24, 2017), http://www.wlf.org/upload/legalstudies/legalopinionletter/022417LOL_Conn.pdf.

WLF agrees with Petitioner that the Ninth Circuit's extension of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), is incorrect and should be reversed because applying the *American Pipe* rule to allow for tolling of otherwise untimely follow-on class actions would undermine the principles of *American Pipe*, and the purpose of statutes of limitations. WLF writes separately to focus on why the Ninth Circuit's extension of *American Pipe* is especially unwarranted in securities class actions like the instant one. Because of equitable considerations specific to securities class actions, equitable balancing militates heavily against applying a tolling rule in such a manner as to allow otherwise time-barred follow-on class actions to be filed by absent class members after certification of an initial securities class action has been denied.

## SUMMARY OF ARGUMENT

In the context of securities class action litigation, the equities weigh heavily against applying the Ninth Circuit's extension of *American Pipe* tolling to permit absent class members to subsequently bring otherwise untimely claims on behalf of a class.

Whereas in *American Pipe* the Court identified a significant efficiency benefit that would result from the tolling of *individual* claims – *i.e.*, the avoidance of innumerable protective filings – there are no such benefits from tolling *class* claims in federal securities class actions. As a result of the Private Securities Litigation Reform Act of 1995 ("PSLRA") "lead plaintiff" provisions, there is no realistic prospect that in the absence of tolling, courts will be inundated with protective filings by class members seeking to bring claims on behalf of the class. Indeed, because the PSLRA presumptively permits only the lead plaintiff applicant with the largest damages to oversee the litigation, only a tiny segment of the putative class in any securities class action stands a reasonable chance of being appointed to litigate the class claims.

Individuals who are not among this small group of investors would have no reason to make a protective filing, or otherwise seek to pursue claims on behalf of the class. Moreover, to ensure a follow-on lawsuit filed on behalf of the entire class is not time-barred in the event the court denies certification of the initial class, all that is needed is ***one*** timely protective filing by ***one*** suitable absent class member that adequately preserves its ability to timely pursue claims in a representative capacity. Tolling in these circumstances is not needed or justified.

There also are equitable considerations that militate heavily *against* the Ninth Circuit's tolling rule in the securities litigation context. The rule leads to the filing of serial class actions, and the successive re-litigation of certification determinations. This imposes obvious and undue burdens on defendants.

The tolling rule also subjects defendant companies to undue pressure to prematurely settle securities class actions for inflated, even "extortionate," amounts that do not reflect fundamental weaknesses, including Rule 23 deficiencies, in the actions. Defendants will be discouraged from trying to defeat certification, because doing so once successfully will not be nearly enough – a further series of substantially identical class actions may still follow, which will prohibitively increase defendant companies' litigation costs and risks to the detriment of their investors.

In turn, plaintiffs' attorneys – knowing that fewer defendants will have the resources and resolve to test a succession of class actions – will be encouraged to inappropriately pursue investor claims in the form of putative class actions. This will result in the increased filing of meritless securities class actions, an outcome that Congress specifically sought to avoid when it passed the PSLRA.

Lastly, the Ninth Circuit's tolling rule operates at cross-purposes with the PSLRA. In particular, the Ninth Circuit's tolling rule would result in fragmented and protracted litigation in the securities class action context that would thwart the coordinated, efficient, and streamlined approach created by the PSLRA and that Congress believed would best serve the relevant competing policy and fairness considerations.

## ARGUMENT

### I. THE EQUITIES WEIGH HEAVILY AGAINST APPLYING THE NINTH CIRCUIT'S TOLLING RULE IN SECURITIES CLASS ACTIONS

As Petitioner has conclusively shown, adopting a tolling rule that would suspend, upon the filing of an initial class action, the applicable statutory deadlines for the filing of subsequent actions on behalf of the class would undermine the principles of *American Pipe* and the purpose of statutes of limitations. *See* Brief for Petitioner ("Petitioner's Brief"), *China Agritech, Inc. v. Resh*, No. 17-432 (U.S. Jan. 22, 2018).

In their Opposition to Petitioner's petition for certiorari, Respondents attempted to sidestep the general problems that extending *American Pipe* tolling would pose for class action litigation. Respondents suggested, *inter alia*, that these problems are not present at all, or at least not to the same degree, in class actions brought under the federal securities laws (such as the instant case brought under the 1934 Act). *See* Respondents' Brief in Opposition at 18-21, *China Agritech, Inc. v. Resh*, No. 17-432 (U.S. Oct. 23, 2017).

Respondents are wrong. In fact, they have it backwards. A balancing of the relevant equities indicates that it would be particularly inappropriate to apply the tolling rule urged by Respondents in federal securities class actions. As the Court has explained, the *American Pipe* tolling rule was "grounded in the traditional equitable powers of the judiciary." *Cal. Pub. Emps. Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017). Although *American Pipe* did not explicitly apply "the formal doctrine

of equitable tolling in any direct manner . . . [t]he balance of the Court's reasoning nonetheless reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice."[2] *Id.* That is to say, in *American Pipe* the Court balanced the equities to determine whether tolling was warranted. *Id.*

The balancing of the equities in *American Pipe* was straightforward and did not lead to a surprising result. The Court regarded the tolling rule as necessary to avoid an outcome in class actions that would be blatantly inefficient. In the absence of tolling, class members would inundate courts with protective filings to insure the preservation of their individual claims in the event the court refused to certify the class. Thus, the tolling rule applied in *American Pipe* (and later applied in *Crown Cork*) "furthered 'the purposes of litigative efficiency and economy' served by Rule 23 . . . [because] [w]ithout the tolling, '[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable,' which would

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[2] As described by the Court in *ANZ Secs.*, the doctrine of "equitable tolling" is but one "example" of a tolling rule derived from the "traditional power of the courts to 'apply the principles . . . of equity jurisprudence.'" *Id.* at 2050 (citing *Young v. United States*, 535 U.S. 43, 50 (2002)). The equitable tolling doctrine "permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" *Id.* (citing *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014)).

'breed needless duplication of motions.'"[3] *ANZ Secs.*, 137 S. Ct. at 2051 (citing *American Pipe*, 414 U.S. at 553-556); *see also, e.g., Korwek v. Hunt*, 646 F. Supp. 953, 964-965 (S.D.N.Y. 1986), *aff'd*, 827 F.2d 874 (2d Cir. 1987) ("The theory at the heart of the *American Pipe* and *Crown Cork* decisions is that a tolling rule makes sense when it is needed to avoid frustrating the central purpose of class action procedure – efficiency and economy of litigation").

In contrast, the Court in *American Pipe* found no substantial hardships weighing ***against*** tolling under the particular circumstances of that case. Although tolling a statute of limitations can, in some instances, unfairly deprive defendants of the timely notice of claims, the Court in *American Pipe* did not believe the defendants in the case would suffer any such prejudice. "By filing a class complaint within the statutory period, the named plaintiff 'notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *Id.* at 2051 (citing *American Pipe*, 414 U.S. at 555). Thus, "'the tolling was in accord with 'the functional operation of a statute of limitations.'" *Id.* (citing *American Pipe*, 414 U.S. at 554).

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[3] The Court in *American Pipe* also reasoned that tolling in that case was in accord with "the functional operation of a statute of limitations," *see infra*. *American Pipe v. Constr. Co. v. Utah*, 441 U.S. 538, 554 (1974).

In short, the balancing of the equities in *American Pipe* led the Court to conclude that adopting the tolling rule in question was appropriate *in that case*.[4] There was a clear benefit to adopting the rule, and the Court perceived no adverse hardship to any of the parties (or any adverse public or policy effects) that would result from the rule as applied in the relevant, narrow context.

The balancing of the equities is starkly different in the circumstances present the instant case.[5] Whereas in *American Pipe* the Court identified clear efficiency benefits that would result from tolling, any such efficiency benefits are illusory in the context of a federal securities class action like the instant one subject to the PSLRA.[6] Litigation efficiency and the desire to achieve fairness were Congress's primary

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[4] *See ANZ Secs.*, 137 S. Ct. at 2053 (the equitable considerations taken into account by the *American Pipe* Court were "sufficient in balancing the equities to allow tolling under the antitrust statute").

[5] As the Court observed in *ANZ Secs.*, *see supra*, the tolling rule applied in *American Pipe* was "derive[d]" ***not*** "from legislative enactments," but "from the traditional power of the courts to 'apply the principles . . . of equity jurisprudence." *Id.* at 2050. Any extension of *American Pipe* tolling likewise would have to be "grounded in the traditional equitable powers of the judiciary," and in the Court's exercise of those powers, a balancing of the relevant equities is obviously appropriate. *Id.* at 2052.

[6] It is undisputed this action, which asserts claims under Securities Exchange Act of 1934, is subject to the PSLRA. *See, e.g.*, Brief for Petitioner at 3, *China Agritech, Inc. v. Resh*, No. 17-432 (U.S. Jan. 22, 2018).

purposes in enacting the PSLRA. In light of the procedural realities of securities class action litigation conducted in accordance with the PSLRA, extending the *American Pipe* tolling rule to cover securities class actions would significantly undermine Congress's desire to enhance efficiency and promote fairness.

Moreover, and in contrast with *American Pipe*, there are countervailing factors that weigh strongly ***against*** the tolling of putative class claims (as opposed to individual investor claims). These equitable considerations include, as an initial matter, that tolling would lead to the filing of serial class actions, which would impose obvious and undue burdens on defendants in securities class actions. In addition, and even more significantly, the Ninth Circuit's tolling rule would: (1) result in companies – to the detriment of their investors – being pressured to prematurely settle certain securities class actions for "extortionate" amounts that do not reflect the case's weaknesses, including deficiencies that may render it unlikely the case could satisfy the requirements of Rule 23; (2) incentivize plaintiffs' attorneys to pursue certain individual litigants' claims in the form of putative class actions even when such claims suffer from Rule 23 deficiencies and never should be brought on behalf of a class; and (3) work at cross purposes with key procedural provisions of the PSLRA that reflect public policy and fairness determinations made by Congress that merit consideration in the Court's balancing calculus with regard to tolling in this situation.

### A. The Equitable Considerations That Supported the Application of Tolling in *American Pipe* (and *Crown Cork)* Do Not Support Application of the Ninth Circuit's Tolling Rule in the Instant Case

In a securities class action such as this one, there are certain absent class members whose damages claims are so significant – or who for other reasons attach such value to their claims – that if the court refused to certify a class, they likely would pursue their claims by bringing their own individual actions. Without a tolling rule that suspended the limitations period with respect to such individual actions, each of these absent class members may feel compelled to make a protective filing. The tolling ruled applied in *American Pipe* (and later in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)) eliminates the need for such protective filings. It thereby relieves a potentially vast number of class members of the burdens of making protective filings, and furthers "'the purposes of litigative efficiency and economy' served by Rule 23." *ANZ Secs.*, 137 S. Ct. at 2051; *see also Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (if *American Pipe* had not suspended the statute of limitations with regard to the individual claims of absent class members, "***all*** class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation – to simplify litigation involving a large number of class members with similar claims – would be defeated." (emphasis added)); *Korwek*, 646 F. Supp. at 964-965 (it was "contemplated by the Supreme Court in . . . *American Pipe* and *Crown Cork*" that "***hundreds, thousands or tens of thousands*** of indi-

vidual protective filings . . . would likely be invited by a refusal to apply the tolling rule" in *American Pipe* (emphasis added)).[7]

For the reasons explained below, however, there is no similar cause for concern that, in a federal securities class action governed by the PSLRA, individual class members would make innumerable protective filings *seeking to frame their cases as class actions* in the absence of a tolling rule that suspended the applicable limitations periods as to such putative class actions.

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[7] *See also, e.g., In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 669 (S.D.N.Y. 2011) ("the purpose of *American Pipe* tolling is to disincentivize putative class members from undermining the efficiency and economy policies underlying Rule 23 by ***flooding the court*** with duplicative, protective motions" (emphasis added)), *vacated on other grounds*, 23 F. Supp. 3d 203 (S.D.N.Y. 2014); 3-24 Products Liability Practice Guide § 24.02 (2017) ("The reason for adopting *American Pipe* tolling is the promotion of judicial economy and efficiency—the main reasons for having a class action procedure in the first place. Without tolling, courts would be ***inundated*** with protective motions to intervene or individual complaints filed by putative plaintiff class members seeking to avoid the statute of limitations bar" (emphasis added)).

### 1. Securities Class Actions are Subject to Procedural Rules That Eliminate Any Prospect That a Large Number of Class Members Would Be Compelled to Make Protective Filings in the Absence of Tolling

There are procedural mechanisms imposed on securities class actions by the PSLRA that, as a practical matter, eliminate any likely prospect that a large number of investors would be compelled to inundate the courts with protective filings absent an extension of *American Pipe* tolling to class actions.

Of particular note here, the PSLRA sets forth a number of procedures relating to the selection of a "lead plaintiff" in class actions arising under the federal securities laws. Under the PSLRA, any class member may move for appointment as lead plaintiff in a securities class action within 60 days of the publication of notice of the pendency of such action. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II) (2010). The lead plaintiff has the responsibility to oversee and supervise the litigation separate and apart from counsel.

The PSLRA directs the court to appoint as lead plaintiff the member of the purported plaintiff class that "the court determines to be most capable of adequately representing the interests of class members," referred to as "the 'most adequate [lead] plaintiff.'" 15 U.S.C. § 78u-4(a)(3)(B)(i)(2010). Significantly, the member of the plaintiff class who applies for lead plaintiff status and suffered the largest financial loss is presumptively the "most adequate lead plaintiff," and in the vast majority of cases, is appointed lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb)-(cc)(2010) (the movant that timely demonstrates it has

"the largest financial interest in the relief sought by the class" and "otherwise satisfies the requirements of Rule 23" is entitled to a presumption that it is the most adequate plaintiff).

Indeed, encouraging sophisticated institutions with a large financial stake in the litigation to serve as lead plaintiff was a critical legislative goal underlying the enactment of the PSLRA. *See, e.g.*, H.R. Conf. Rep. No. 104-369, at 34, reprinted in 1995 U.S.C.C.A.N. 730, 733 (explaining that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions").[8]

The practical effect of the foregoing lead plaintiff provisions is that, even if the Court does not extend *American Pipe* tolling to securities class actions, there will be very few filings of a protective nature beyond what would be filed in the ordinary course in a securities class action. Because of the PSLRA's stringent lead plaintiff rules, only a very small segment of the putative class in any securities

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[8] *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007) (stating that the lead plaintiff "innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs"); *In re Reliant Sec. Litig.*, No. 02-cv-1810, 2002 U.S. Dist. LEXIS 27777, at *9-10 (S.D. Tex. Aug. 27, 2002) ("Large institutional investors . . . tend to be sophisticated investors capable of controlling attorneys in securities fraud litigation, and the [PSLRA], by emphasizing financial stake, expresses a preference for appointing such investors").

class action would stand any reasonable chance of being appointed lead plaintiff and being permitted to pursue claims on behalf of the class.[9] An investor who is not among this select group of investors would hardly go to the trouble of making a protective *class* filing. Thus, because making a protective filing would be futile for the vast majority of class members, no extension of the *American Pipe* tolling rule is needed to avoid the flood of potentially "hundreds, thousands or tens of thousands of individual protective filings" that the Court sought to avoid by applying a tolling rule in that case.[10] *Korwek*, 646 F. Supp. at 965.

Moreover, among the small group of sophisticated investors in any securities class action who have suffered sufficiently substantial damages to stand a reasonable prospect of securing lead plaintiff status, not even all of those investors would make protective

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[9] In a typical securities class action, many investors never want or need to exercise personal control over the litigation of their own claims because they have relatively small damages. Nor do they want or need to pursue their claims on behalf of the entire putative class of investors (and, indeed, pursuant to the PSLRA's lead plaintiff rules, such investors would stand no chance of being appointed lead plaintiffs in any securities class actions, *see infra*). Finally, their ability to pursue their own individual action is already adequately protected by the *American Pipe* rule.

[10] *See also, e.g., Employers-Teamsters Local Nos. 175 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 925 (9th Cir. 2007) ("*Anchor Capital*") (the PSLRA "certainly was ***not*** intended to allow parties to benefit from tolling when they would not have filed a complaint in the first place" (emphasis in original)).

filings with the court. Because a protective filing by any one of these investors would be public and in some instances accompanied by a widely-dispersed press release in accordance with the PSLRA's notice requirements,[11] all other potential filers would be on notice that a sophisticated investor has already taken measures to preserve the claims on a class-wide basis.

At bottom, the focus of the *American Pipe* decision was on the preservation of each individual absent class member's ability to pursue his or her own claim in the event certification of the initial class action was denied (e.g., for failure to satisfy the typicality and adequate representation requirements of Rule 23(a)(3) and (a)(4)), without requiring each class member to make a protective filing to avoid being time-barred. The number of such protective filings that would be required in the absence of *American Pipe* tolling is potentially vast because each class member would have to make its own filing to protect its ability to later pursue its claim individually. Thus, there might be as many protective filings as there are class members.

By contrast, to ensure a follow-on lawsuit filed on behalf of the entire class is not time-barred in the event certification of the initial class action is denied, all that is needed is ***one*** timely protective filing by ***one*** suitable absent class member that adequately

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[11] Under the PSLRA, once a federal securities class action has been filed by any plaintiff, that plaintiff must, within 20 days, "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice" that advises all class members that a suit has been filed, and the nature of the claims. 15 U.S.C. § 78u- 4(a)(3)(A)(i)(I) (2010).

preserves its ability to timely pursue claims in a representative capacity.[12] Tolling in these circumstances is not needed or justified.

In any event, in the securities class action context and in light of the PSLRA's lead plaintiff provisions (*see supra*), as a practical matter only one or a few sophisticated investors would consider it necessary or desirable to take protective measures to ensure their ability to file claims on behalf of the class, and/or to serve as a class representative. These protective filings might take a number of forms.

*First*, an investor might institute a case by filing a class action complaint and then seek lead plaintiff status in that case.

*Second*, an investor might not file its own complaint, but rather seek lead plaintiff status in a case commenced by another investor. Along the same lines, the investor also could wait until the class certification stage of the case, and then file an intervention motion seeking appointment as a class representative in the case. Or the investor can just simply ask class counsel to put the investor forward as a class representative. *See, e.g.*, William B. Rubenstein, Newberg on Class Actions section 2:1 n.8 (5th ed. 2011) ("Class counsel need ***not*** put forward all named plaintiffs, or ***only named plaintiffs***, as proposed class representatives." (emphasis added)).

*Third*, even if one investor has already filed a class action complaint, a second investor who seeks

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[12] And if just a few other such protective filings were made by a few other absent class members, it would provide a more than adequate safety net in the event one of the protective filings proved defective.

to assert claims on behalf of the class can file its own class action complaint in another appropriate jurisdiction. That second investor might then agree to the consolidation of its case with the first case, but pursue a stay of its case pending the outcome of the first case. In that scenario, if the first investor fails to obtain certification of its class action suit, the second investor can then seek to proceed with its case.

*Lastly*, but hardly least, an investor who cannot or does not want to secure lead plaintiff status or file its own complaint can still pursue its interest in asserting claims on behalf of the entire putative class by requesting to be included in an existing class action as a named plaintiff asserting claims in a representative capacity. *See, e.g., In re Citigroup, Inc.*, No. 08 Civ. 3095(LTS), 2011 WL 744745, at *1 (S.D.N.Y. Mar. 1, 2011), *aff'd sub nom. Finn v. Barney*, 471 F. App'x 30 (2d Cir. 2012) (noting existence of two parties who were named plaintiffs, but not lead plaintiffs, "assert[ing] claims on behalf of the putative class of investors"). A request can be made either informally,[13] or by formal means (*i.e.*, through an intervention

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[13] Once a lead plaintiff and lead counsel are appointed pursuant to the PSLRA's lead plaintiff provisions, 15 U.S.C. § 78u- 4(a)(3)(B)(i), courts invariably permit the lead plaintiff to file an amended complaint, in large part because it is the lead plaintiff, rather than the plaintiff who initially filed a complaint in the case, who is authorized to exercise control over the litigation as a whole, which includes deciding what claims to assert on behalf of the class. *See, e.g., In re Bank of Am. Corp. Sec. Derivative & Emp't Ret. Income Sec. Act (ERISA)*, No. 09 MDL 2058 (DC), 2010 WL 1438980 at *2 (S.D.N.Y. April 9, 2010). If, at that time, any other investors wish to protect their ability to file claims on behalf of

or joinder motion) by or on behalf of a sophisticated investor seeking to protect its ability to assert claims on behalf of the entire putative class.[14] This request can be made either before the lead plaintiff files the operative complaint in the case, or after. *See generally* Wright & Miller, 6 Fed. Prac. & Proc. Civ., § 1474 (3d ed. 2016) (motions to add a person to a complaint as a named party are permitted by Fed. R. Civ. P. 15 and Fed. R. Civ. P. 21).

It bears emphasis that, as Petitioner has demonstrated, tolling is generally warranted only where, at a minimum, plaintiff has demonstrated diligence. *See, e.g., ANZ Sec.*, 137 S Ct. at 2050-2051 ("the doctrine of equitable tolling . . . permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'") (citing *Lozano*, 134 S. Ct. at 1231-1232). Here, a plaintiff who fails to take any of the simple protective measures enumerated above can hardly establish "diligence." Indeed, Respondents here took none of these measures, and cannot show any "diligence" whatsoever. *See* Brief for Petitioner at 11, 37. On this basis alone, tolling is unwarranted.

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the class, they need simply to contact lead counsel and ask to be included in the operative amended class action complaint as named, representative plaintiffs. The PSLRA and Rule 23 contain no obstacles to the addition of non-lead, named representative plaintiffs to an operative securities class-action complaint.

[14] *See, e.g., Anchor Capital*, 498 F.3d at 923 (the denial of an investor's lead-plaintiff motion does "not leave them without a remedy . . . [they have a] host of options [including] fil[ing] a motion for intervention").

In sum, in securities class actions, under the procedural rules imposed by the PSLRA, individual investors have nothing to gain by making countless protective filings that preserve the ability of each investor to file an action in which he or she seeks to bring claims on behalf of the class. As such, in the securities class action setting, investors will not flood courts with protective filings, whether or not there is a tolling rule that suspends the applicable time limitations on the filing of ensuing class actions. At most, extending the *American Pipe* tolling rule to later-filed cases filed by individual class members on behalf of the entire class might prevent a small handful of filings. Thus, in light of the PSLRA (*see infra*), "the purposes of litigative efficiency and economy" that animated *American Pipe* do not support the Ninth Circuit's extension of the *American Pipe* tolling rule.

### B. There are Equitable Considerations in PSLRA-Governed Securities Class Actions That Weigh Heavily *Against* the Tolling of Securities Class Actions

There are multiple equitable considerations in this and other securities class actions subject to the PSLRA that also militate ***against*** the application of the tolling rule relied upon by the Ninth Circuit below. As explained in detail below, the most notable of these equitable considerations are as follows:

*First*, the Ninth Circuit's tolling rule will lead to the filing of serial class actions, which will impose obvious and undue burdens on defendants in securities class actions.

*Second*, the tolling rule would unfairly pressure companies – to the detriment of their investors – to

prematurely settle certain securities class actions for inflated, even "extortionate," amounts that do not reflect the case's weaknesses, including deficiencies that may render it unlikely the case could satisfy the requirements of Rule 23. As such, the Ninth Circuit's tolling rule incentivizes plaintiffs' attorneys to inappropriately pursue certain individual litigants' claims in the form of putative class actions, thereby leading to the increased filing of meritless securities class actions.

*Lastly*, the Ninth Circuit's tolling rule works at cross purposes with key procedural provisions of the PSLRA that reflect public policy and fairness determinations made by Congress that merit consideration in the Court's balancing calculus with regard to tolling in the instant case.[15]

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[15] As the Court underscored in *American Pipe*, when courts consider whether "in a given context" tolling a statute of limitations is appropriate, the relevant "legislative scheme" – in addition to considerations of fairness – should be taken into account. *American Pipe*, 414 U.S. 538, 558 (1974) (in deciding whether to apply a tolling rule, a court must, *inter alia*, determine "whether tolling the limitation in a given context is consonant with the legislative scheme"); *ANZ Secs.*, 137 S. Ct. at 2053 (the equitable considerations taken into account by the *American Pipe* Court were "sufficient in balancing the equities to allow tolling ***under the antitrust statute***" (emphasis added)). Thus, in the Court's exercise of its equitable powers in determining whether tolling should apply in the instant case, it is appropriate to consider the effects of tolling in light of the PSLRA and the underlying policy and fairness considerations embodied in the PSLRA that prompted its passage by Congress. Congress itself considered issues of fundamental fairness in determining that the PSLRA and its procedural protections were necessary, and carefully fashioned the contours of the

### 1. The Ninth Circuit's Extension of the *American Pipe* Tolling Rule Encourages Plaintiffs' Lawyers in Securities Litigation to Serially File Duplicative Class Actions

As Petitioner has shown, extending *American Pipe* tolling to permit class actions to be filed outside the applicable limitations period will lead to the filing of serial, duplicative class actions, contrary to the principles of *American Pipe* and the purpose of statutes of limitations. *See* Petitioner's Brief. In their Opposition to China Agritech's Petition for a Writ of Certiorari, Respondents suggested that in the securities litigation context, the problem of serial class actions does not exist, or the severity of that problem is greatly diminished, because securities claims are subject to statutes of repose, which this Court has held are not subject to equitable tolling. *See* Respondents' Brief in Opposition.

Respondents are mistaken. Despite the existence of statutes of repose, and the Court's decision in *ANZ Securities*, the tolling rule applied by the Ninth Circuit below still opens the door to serial class actions in cases filed under the 1934 Act (under which the claims in this action were brought) and even the Securities Act of 1933 (the "1933 Act") (under which the claims in *ANZ Securities* arose) that otherwise would be time-barred by the applicable statutes of limitations.

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PSLRA to reflect an appropriate balancing of the fairness interests of all litigants, including plaintiffs who seek to pursue meritorious securities claims. *See infra*.

This case itself proves the point. Claims brought under the 1934 Act, like the claims in the instant case, are subject to a 5-year statute of repose. Yet the instant case is the third identical class action brought on behalf of shareholders of China Agritech alleging violations of the 1934 Act. Not only were Respondents able to file a third identical class action prior to the expiration of the statute of repose, class counsel would have been able to add one or more additional class actions had this case not been on appeal for three years.

It therefore is beyond dispute that, in the context of the 1934 Act, extending *American Pipe* tolling will permit plaintiffs' attorneys to file, in serial fashion, multiple securities class actions. Although the 1933 Act has a shorter repose period (3 years), there plainly is enough time even within that period for more than one class action to be filed. This is especially true since Rule 23 of the Federal Rules of Civil Procedure "requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained." Fed. R. Civ. P. 23 (c)(1)(A) advisory committee's note to 1966 amendment; *see also American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring) ("Rule 23(c)(1), of course, provides that the court shall decide whether a class action may be maintained '[a]s soon as practicable after the commencement of an action.' This decision, therefore, will normally be made expeditiously").

The Ninth Circuit's tolling rule would increase the likelihood that any defendant in a securities class action would ultimately face a series of duplicative or closely overlapping class actions. Needless to

say, this increased exposure to class actions would, in and of itself, increase the litigation burdens that companies and persons named in securities class actions confront, and these burdens must be considered in weighing the equities of applying a tolling rule in this case.

### 2. The Ninth Circuit's Tolling Rule Increase Opportunities for Plaintiffs' Lawyers to Seek the "Extortionate Settlements" and File the Meritless Securities Class Actions That Congress Specifically Sought to Curb Through Passage of the PSLRA

One year after this Court's *American Pipe* decision, the Court issued its decision in *Blue Chip Stamps*. There, the Court recognized that due to incentives to bring weak securities cases under Section 10(b) of the 1934 Act and for companies to settle those cases, securities class action litigation posed "a danger of vexaciousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Mamore Drug Stores*, 421 U.S. 723, 739 (1975).

Twenty years later, in an effort largely to address these same dangers in a broad range of securities lawsuits, Congress enacted the PSLRA.[16] The PSLRA was prompted by Congress's fears that the

[16] The PSLRA amended the 1933 Act and 1934 Act by establishing a number of procedural protections that apply largely to misstatement claims brought under those federal securities statutes.

"private securities litigation system" was being "undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. Conf. Rep. No. 104-369, at 31, reprinted in 1995 U.S.C.C.A.N. 730, 730 (1995). Among other concerns animating the passage of the PSLRA were, *inter alia*, "nuisance filings, targeting of deep-pocket defendants, [and] vexatious discovery requests," – abuses that "had become rampant" in the years leading up to the PSLRA. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31).

Of particular concern to Congress was that litigation abuses often "resulted in extortionate settlements . . . ultimately harming the very people the securities laws were meant to protect: investors."[17]

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[17] Unduly large settlements obviously are detrimental to the interests of a company's current investors. Indeed, they are detrimental to many members of the putative members of a class, because in many instances class members are still investors – *i.e.*, they continue to own shares of the company. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring) (securities fraud litigation carries the risk of "large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyer."); Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 STAN. L. REV. 1487, 1503 (1996) ("payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up"); 141 Cong. Rec. H2749-02, at H2753 (1995) (in securities "strike suits," harms to companies as well as their investors greatly overshadow any settlement recoveries by investor class members).

*See* H.R. Conf. Rep. No. 104-369, at 31-32.[18] The curtailment of such "extortionate settlements" was among the chief intended effects of the PSLRA. *Id.*; *see also Dabit*, 547 U.S. at 80-81. This concern with "extortionate settlements" pre-dated the PSLRA, and persists even after its passage. *See, e.g., Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (noting "numerous courts and scholars have warned that settlements in large [securities] class actions can be divorced from the parties' underlying legal positions"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (discussing the "inordinate or hydraulic pressure on [securities fraud] defendants to settle, avoiding the risk, however small, of potentially ruinous liability"); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (discussing circumstances that "lead[] defendants to pay substantial sums even when the plaintiffs have weak positions").

Adopting the Ninth Circuit's tolling rule in the context of securities class actions would undermine Congress's foregoing policy objectives – and the fairness considerations underlying those objectives – in enacting the PSRLA. In particular, the rule would (1) increase the incentive for plaintiffs' attorneys to file

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[18] *See also, e.g.*, H.R. Rep. No. 105-640, at 9 (1998) (Congress passed the PSLRA with the hopes of "put[ting] an end to vexatious litigation that was draining value from the shareholders and employees of public companies").

weak class actions,[19] and inappropriately pursue inflated settlements in connection with those cases, and (2) impose new pressures on defendant companies – to the detriment of their investors (many of whom are putative class members in any purported class action filed against the companies) – to prematurely settle the cases for inflated amounts that do not accurately reflect the defects in the cases, including defects that would preclude the plaintiffs from ultimately satisfying Rule 23's certification requirements.

If the Court were ***not*** to adopt the tolling rule of the Ninth Circuit, a plaintiff whose prospects of satisfying the requirements of Rule 23 are poor would have little incentive to frame its lawsuit as a class action. Moreover, even if the plaintiff still elected to file a suit on behalf of other shareholders, and secured lead plaintiff status, the reasonable settlement value of plaintiff's case would be appropriately diminished by the odds that a court would eventually refuse to certify the class.

If, however, the Court were to adopt the Ninth Circuit's tolling rule, it would increase the probability that the foregoing hypothetical plaintiff would file his or her meritless class action lawsuit anyway, notwithstanding its Rule 23 (and any other) weaknesses, because the settlement value of that plaintiff's case

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[19] In the class action context, a case can be weak in at least one of two ways. It can be weak in that the individual claims of the lead plaintiff are weak. It also can be weak in that the claims asserted by the lead plaintiff are not appropriate for class action treatment – in other words, the case is weak from the standpoint of Rule 23. In enacting the PSLRA, Congress undoubtedly was focused on both kinds of weak cases.

would be inflated by the possibility of subsequent filings.[20] From the defendants' perspective in this scenario, even if they defeat certification of the plaintiff's lawsuit, another one will spring up in its place, and even if that one is defeated too, yet another one may follow, and so on and so on (until the applicable statute of repose precluded the filing of any new actions). The defendants thus will be under increased pressure to settle, and more vulnerable to demands to settle the initial case for an inflated amount to avoid the otherwise certain burdens of defending a series of class actions.

In short, extending *American Pipe* tolling in the manner urged by Respondents would add an additional increment to the *in terrorem* effect of the filing of a securities class action complaint. Any person who might otherwise be deterred from filing a deficient complaint will be incentivized to do so by the prospect that the person might obtain some additional incremental measure of recovery through settlement simply by leveraging the possibility that the defendants will face a protracted series of class actions.

Adopting a tolling rule that leads to these results is obviously inequitable – and, from the standpoint of the relevant "legislative scheme," particularly inappropriate, given Congress's express intention to curb extortionate settlements and the filing of

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[20] *Cf. American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (recognizing that the tolling rule applied by the Court might impact litigation behavior, in that it could "be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action").

non-meritorious "strike suits." Putting issuers in a position wherein it is no longer sufficient to defeat a case at class certification – *i.e.*, establish the infirmities of a class action – but instead they must relitigate the same class action multiple times, is a form of oppression that runs squarely counter to the PSLRA's basic objectives.

### 3. The Ninth Circuit's Tolling Rule Would Undermine PLSRA Requirements for a Regimented, Coordinated, and Streamlined Approach to the Litigation Process for Securities Class Action Litigation That Reflects Important Public Policy and Fairness Considerations

The Ninth Circuit's tolling rule also works at cross purposes with key procedural provisions of the PSLRA that reflect public policy and fairness determinations made by Congress. *See, e.g.*, 141 Cong. Rec. S17933-04, at S17954 (1995) (Conf. Rep.) (PSLRA will "help restore integrity and fairness to the country's private securities litigation system"); S. Rep. 104-98, at 4, reprinted in U.S.C.C.A.N. 679, at 683 (1995) (Congress intended for the PSLRA to "return some fairness and common sense to our broken securities class action litigation system"). These determinations merit significant consideration in the Court's equitable balancing calculus with regard to tolling in the instant case and other securities class actions.

As previously noted, the Ninth Circuit's tolling rule unquestionably would lead to the filing of serial class actions. *See* Petitioner's Brief. This would result in a fragmented and protracted approach to class

action litigation that is squarely at odds with the coordinated and streamlined approach to securities class action litigation contemplated by the PSLRA.[21] In adopting that approach, Congress already carefully balanced relevant competing policy and fairness considerations at issue. *See, e.g.*, H. R. Conf. Rep. No. 104-369, at 39 (recognizing "the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of [securities] fraud to pursue legitimate claims").

The specific provisions of the PSLRA whose objectives would be undermined by the Ninth Circuit's position include provisions that (1) mandate that once an initial class action is filed, notice must be provided

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[21] For the reasons discussed herein, the primary policy and equitable considerations underlying the PSLRA are at odds with the Ninth Circuit's rule that permits the filing, *in seriatim* fashion, of otherwise untimely class actions following the failure of an initial lead plaintiff to obtain certification of the initial class action. The PSLRA is *not*, however, similarly inconsistent with the application of the *American Pipe* rule – *i.e.*, the tolling of the applicable limitations periods merely with regard to individual actions brought by individual class members. Indeed, as a general matter, in enacting the PSLRA, Congress was not focused on individual actions, but on class actions. *See, e.g.*, Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 DUKE L.J. 1251, 1302 (2002) ("Frivolous litigation generates social costs wherever it exists, but these costs are particularly acute in the class action setting because the scale of the class action magnifies the adverse effects"); 141 Cong. Rec. S17933-04, at S17948 (1995) (the "sole focus of this legislation [*i.e.*, the PSLRA] is lawsuits brought by private investors as part of a ***class action proceeding***" [*i.e.*, not investor lawsuits brought as individual actions] (emphasis added)).

to all investors;[22] (2) require any investor who wishes to lead a class action step forward at a very early stage and apply for "lead plaintiff" status,[23] (3) require courts to promptly appoint a lead plaintiff, so that a leadership structure for the initial class action and related class actions is in place as soon as possible;[24] (4) confer responsibility on the lead plaintiff to

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[22] As noted *supra*, under the PSLRA, once a federal securities class action complaint has been filed by any plaintiff, that plaintiff must, within 20 days, "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice" that advises all class members that the suit has been filed, and the nature of the claims. 15 U.S.C. § 78u-4(a)(3)(A)(i)(I) (2010).

[23] The PSLRA reflects a clear policy choice by Congress to encourage investors who wish to bring claims on behalf of a class to come forward early. The PSLRA imposes a 60-day deadline for filing motions seeking lead plaintiff appointment, and courts strictly enforce that deadline to ensure that a leadership structure for the case and related cases is put in place "as quickly as possible." *Lax v. First Merchs. Acceptance Corp.*, 1997 WL 461036, at *4 (N.D.Ill. Aug. 11, 1997); *see also, e.g. Reitan v. China Mobile Games & Entm't Grp., Ltd.*, 68 F. Supp. 3d 390, 396 (S.D.N.Y. 2014) ("[t]he PSLRA's statutory text . . . evinces Congress's desire to have lead plaintiffs appointed ***as soon as practicable***" (emphasis added)). Of note, courts do not require a new lead plaintiff notice to be published each time a complaint is amended, because a contrary rule would repeatedly reopen the lead plaintiff appointment process. *See, e.g., In re Telxon Secs. Litig.*, 67 F. Supp. 2d 803, 819 (N.D. Ohio 1999); *Lax*, 1997 WL 461036, at *4.

[24] The PSLRA requires courts to appoint a "lead plaintiff" within 90 days of the publication of the required notice. 15 U.S.C. § 78u-4(a)(3)(B)(i) (2010).

exercise oversight responsibility over the litigation of the class action;[25] (5) require courts to consider the consolidation of certain related securities class actions;[26] and (6) impose severe time limitations on, and/or otherwise encourages prompt consideration of submissions made with regard to various procedural and substantive matters in the case.[27] *See supra.*

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[25] *In re Bank of Am. Corp. Sec. Derivative*, 2010 WL 1438980 at *2 (citing *Hevesi*, 366 F.3d at 82 n.13) ("[I]n a securities class action, a lead plaintiff is empowered to control the management of the litigation as a whole . . . . Permitting other plaintiffs to bring additional class actions [after the lead plaintiff is appointed in the initial class action], with additional lead plaintiffs and additional lead counsel, would interfere with Lead Plaintiff's ability and authority to manage the [action]"); *see also, e.g., id.* (under the PSLRA, the lead plaintiff "ha[s] the authority to decide what claims to assert on behalf of the class"); William B. Rubenstein, Newberg on Class Actions §§ 3:52, 10:13 (5th ed. 2011); 15 U.S.C. § 78u-4(a)(3)(B)(v) (2012) (lead plaintiff has responsibility to "select and retain counsel to represent the class").

[26] The PSLRA directs courts to consider any motion for consolidation if "more than one action on behalf of a class asserting substantially the same claim or claims arising under this Chapter has been filed." 15 U.S.C. § 78u-4(a)(3)(B)(ii) (2010).

[27] These time limitations do not simply value efficiency for its own sake. They also provide further support for Congress's twin goals of "encourag[ing] defendants to fight abusive claims" and deterring settlements that are based merely on the "economics of litigation" rather than the merits. *See* S. Rep. 104-98, 6-7, 1995, reprinted at U.S.C.C.A.N. 679, 685-86; *see also id.* at 713 (lamenting that "innocent corporations [were] subject to expensive and time consuming litigation" and seeking to enable "early dismissal of abusive securities suits").

## CONCLUSION

For the reasons set forth above, a balancing of the relevant equities and consideration of the interests of justice compel the conclusion that in the securities class action context, it would be unwarranted – indeed, impose adverse collateral consequences – to extend *American Pipe* tolling to allow the filing of otherwise untimely class actions. In PSLRA-governed actions, the interests of justice generally – and fairness to investors and issuers in particular – strongly militate in favor of preventing serial class actions from being filed beyond the statutorily-mandated period of limitations. The Ninth Circuit tolling rule also would operate at cross-purposes with PSLRA provisions designed to (1) minimize the potential for litigation abuses, (2) protect investors and companies from extortionate settlements and frivolous cases, and (3) impose a regimented and streamlined approach to the litigation of securities class actions. In sum, extending *American Pipe* tolling as the Ninth Circuit did is not appropriate in any context, least of all in the context of securities class action litigation. *Amicus Curiae* Washington Legal Foundation therefore respectfully urges the Court to reverse the decision below.

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